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In the Supreme Court of the United States

October Term, 1981

PANHANDLE EASTERN PIPE LINE COMPANY AND NATIONAL HELIUM CORPORATION, *Petitioners,*

vs.

MOBIL OIL CORPORATION, ET AL., and RALPH GROUNDS, ET AL., *Respondents,*

and

UNITED STATES OF AMERICA, *Intervenor.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Tenth Circuit Court of Appeals has violated petitioners' rights under the Fifth Amendment to the United States Constitution and failed to follow the decision of this Court in *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974) by holding void contract provisions relating to the sale of and the right to extract helium and substituting therefor its own scheme of utility type rate making?

II. Whether the Circuit Court of Appeals violated Rule 52(a) of the Federal Rules of Civil Procedure and *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) in creating a contract for the benefit of third parties which would result in millions of dollars being paid to thousands of producers and royalty owners when such theory of recovery was not raised in the trial court and findings of fact by the trial court were directly contrary to the existence of a contract for the benefit of third parties?

III. Whether findings of fact and conclusions of law with respect to a claim in quantum meruit for the reasonable value of helium asserted under the law of Texas may be applied by the Circuit Court, through the device of the "Law of the Case Doctrine," as to claims in quantum meruit for the reasonable value of helium asserted under the law of Kansas where the parties and the significant facts in the two cases are not the same?

PARTIES BELOW

Throughout the proceedings below, the parties have for convenience been categorized as follows:

Petitioners were included in a group of natural gas pipeline companies and helium extraction companies referred to as the Helex Group.[1]

The second group, referred to as the lessee-producers group, includes numerous named parties as representatives of more than 500 independent producers who produce natural gas containing helium for sale to natural gas pipeline companies.[2]

A third group consists of oil and gas royalty owners and is referred to as the landowners group.[3]

The United States was allowed to intervene in the action as a party plaintiff.

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1. Panhandle Eastern Pipeline Company; National Helium Corporation; Northern Natural Gas Company; Cities Service Cryogenics, Inc.; Northern Helex Corporation; Northern Natural Gas Products Company; Cities Service Gas Company; Cities Service Helex, Inc. The parents and subsidiaries of National Helium Corporation and Panhandle Eastern Pipe Line Company are listed in Appendix QQ.

2. Cabot Corporation; Helmerich & Payne, Inc.; Texaco, Inc.; Ashland Oil & Refining Company; Dorchester Gas Producing Company; Mobil Oil Corporation; Cities Service Oil Company; Gulf Oil Corporation; Pan American Petroleum Corporation; Diamond Shamrock Corporation; Superior Oil Company; Mapco Production Company; Phillips Petroleum Company; Amoco Production Company; Atlantic Richfield Company and El Paso Natural Gas Company.

3. This group of landowners is made up of over 1,000 named parties purporting to represent the more than 30,000 persons who granted the oil and gas leases under which the natural gas involved was produced. Such parties are listed in Appendix PP.

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OPINIONS BELOW

The United States District Court for the District of Kansas rendered an unreported opinion concluding that it had jurisdiction of the interpleader actions involved herein. The decision of the Court of Appeals for the Tenth Circuit affirming the decision *per curiam* (App. A309)[1] is reported at 327 F.2d 1003. Thereafter, the

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1. Citations to "App." refer to the separate appendix that accompanies this Petition for Writ of Certiorari, pursuant to Rule 21.1(k) of this Court.

District Court bifurcated the cases into the liability phase and the damages or value phase. The opinion of the United States District Court for the District of Kansas on the merits of the liability phase (App. A170) is reported at 292 F. Supp. 619. The opinion of the Court of Appeals for the Tenth Circuit on the merits on the liability phase (App. A133) is reported at 441 F.2d 704. Petitions for certiorari filed by the landowners and by the Helex Group were denied by the Supreme Court, *Grounds v. Northern Natural Gas Co.*, 404 U.S. 951 (1971) and *Northern Natural Gas Co. v. Mobil Oil Corp.*, 404 U.S. 1063 (1972), respectively. Justices Stewart and Blackmun would have granted the petitions.

The opinion of the District Court for the District of Kansas on the merits of the value phase (App. A28) is reported at 393 F. Supp. 949. The opinion of the Court of Appeals for the Tenth Circuit on the merits of the value phase (App. A1) is reported at 666 F.2d 1279.

JURISDICTION

The judgments of the Tenth Circuit Court with respect to the value phase were entered November 16, 1981. Timely petitions for rehearing and suggesting for rehearing en banc filed by the Helex Group and by the United States Government were denied on January 19, 1982, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are set out in the appendix to this petition the following provisions:

Constitution of the United States, Fifth Amendment. (App. A539).

Natural Gas Act, 15 U.S.C. § 717 *et seq.* (App. A539).

Helium Act Amendments of 1960, 50 U.S.C. § 167i. (App. A540).

STATEMENT OF THE CASE

This petition for certiorari is to determine whether an appellate court may substantially impair contract obligations, substitute its own scheme of rate making, create contract rights in others unintended by the contracting parties, and make findings of fact and conclusions of law totally inconsistent with the facts introduced at the trial and found by the trial court, and contrary to the applicable state law.

Congress enacted the Helium Act Amendments of 1960, 50 U.S.C. § 167 *et seq.* authorizing the Secretary of the Interior to develop a helium conservation program so that this national resource would not be lost. Pursuant to the Helium Act Amendments, the Secretary entered into helium supply contracts in 1961 with four companies including the petitioner, National Helium Corporation (National Helium). Each of the four companies under its respective contract with the Government was to build one or more helium extraction plants and then to sell the extracted but unrefined helium to the Government. The price to be paid varied from contract to contract but

the Government endeavored to negotiate the price in each contract on the basis of the estimated cost the Government would incur if it built and operated its own plants. As one of the Government's price negotiation considerations, it included in its cost buildup a payment of $2.00 per 1,000 cubic feet (Mcf) as an estimated price it would pay for helium delivered to a Government extraction plant. This $2.00 figure does not appear in any contract with the Helex Group and was in evidence only as one of the considerations taken into account by the Government in its price negotiations. The figure reflects no more than an estimate by the Bureau of Mines of what it would cost the Government to acquire extraction rights from natural gas belonging to others for use in a Government plant. *Northern Natural Gas Company v. Grounds*, 292 F. Supp. 619, 657 (D. Kan. 1968). (*Grounds I*) (App. A238).

Each of the Government contracts had a price stated in two parts. The first part represented the cost of gas, *i.e.*, the cost of the shrinkage of the natural gas occurring as a result of the helium extraction and of any natural gas consumed as fuel in the extraction process. In the case of National Helium, this price for the helium and other shrinkage and for the fuel gas was stated in the Government contract to be 91 cents per Mcf (App. A627), which is noticeably less than the $2.00 estimate of the Bureau of Mines. The second part represents the balance of the price to be paid for the helium delivered to the Government.

The natural gas involved was produced in four states, Texas, Kansas, Oklahoma and Colorado. The gas was transported in interstate pipelines by Panhandle Eastern Pipe Line Company (Panhandle) to National Helium's helium extraction plant, which was built near Liberal, Kansas, after the Government contract had been executed. Panhandle was a producer of some of the natural gas and

acquired the balance of the feed stock gas through gas purchase contracts with various other producers. Some of these gas purchase contracts specifically recognized that helium was a valuable commodity and the parties contracted with respect to the helium and the rights and obligations pertaining thereto. (App. A578-A610). In particular, after the execution of the Government supply contract, Panhandle executed contracts with certain producers which reserved the right in the sellers to extract the helium for their own account. If they failed to do so, they would waive any further claim to the helium except to receive the purchase price of the helium constituent which would be the same as for the balance of the natural gas stream. Another major Panhandle purchase contract with a producer released Panhandle from all claims of any nature from the beginning of the world to the date of the release, which included claims for helium. (App. A610).

The present litigation originated as six cases in the nature of interpleader. The cases have come to be known as the "Consolidated Helium Cases" and have been referred to at times by the courts as the "Grounds" cases. The interpleader cases were brought to determine the rights to proceeds from the crude helium processed in the Kansas plants and sold to the United States Government pursuant to the conservation contracts.

The trial court in *Grounds I* held that the leases conveyed title to the helium constituent from the landowners to the producers and that the gas purchase contracts conveyed title from the producers to the pipeline companies. Accordingly, the court awarded the interpleader funds to the Helex Group and dismissed the landowners' claims against the United States.

The Tenth Circuit Court, while agreeing with the District Court that title to the helium passed under the leases

and again under the gas purchase contracts, nevertheless held that the contract provisions for the price of helium were of no effect, and that the producers were entitled to recover a reasonable value for the helium content of the natural gas which they had produced and the landowners were entitled to receive royalties on the value of the helium produced from their land. *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (10th Cir. 1971). (App. A133). The Tenth Circuit denied motions for rehearing on May 20, 1971, and the Supreme Court thereafter denied certiorari. *Grounds v. Northern Natural Gas Co.*, 404 U.S. 951 (1971); *Northern Natural Gas Co. v. Mobil Oil Corp.*, 404 U.S. 1063 (1972). Justices Stewart and Blackmun voted to grant certiorari.

Shortly before the trial to determine value, the holding of the Tenth Circuit Court in *Grounds I* was amplified by the Supreme Court in *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974). (App. A494). In *Texaco* this Court examined the Tenth Circuit opinion in *Grounds I* and held that the claim there asserted for the reasonable value of helium was an action in quantum meruit under state law and not a cause of action predicated on federal law. This Court, in so holding, reversed the Tenth Circuit Court in *Texaco*.

The Tenth Circuit in *Grounds I* remanded the consolidated interpleader cases to the trial court to determine the "reasonable value at time of sale of the helium content of the natural gas the Helex Group has received from the lessee-producers and which has been processed in the plants of the Helex Group for the separation of helium from natural gas". (App. A354, A357). *Grounds II* was tried to the court based upon the record in *Grounds I*, as far as relevant, and 22 days of submissions of additional evidence. *Northern Natural Gas Company v. Grounds*,

393 F. Supp. 949 (D. Kan. 1974). (App. A28). The trial court searched for the reasonable value of helium in the various states and markets. In addition to contractual evidence, it fully considered evidence offered by the lessee-producers and extractors concerning markets for and costs of extracting helium. From that extensive evidence the trial court rejected lessee-producers' sole theory of value arrived at by use of a "proceeds less expense" approach. The trial court found that the amount claimed exceeded the amount the United States paid the extractors, hence exceeded the fund over which it had jurisdiction. The trial court, contrary to the lessee-producers' contention, found that "there were markets for the commingled helium as it passed from the wellhead to the pipeline companies" (App. A100) and based upon a review of all of the evidence found that, at the point of sale and delivery from the producers to the respective pipeline companies, the helium content had a value of $.60 Mcf to $.70 per Mcf during the period in question. (App. A105).

On appeal, the *Grounds II* case was consolidated for the purpose of oral argument to the court en banc (App. A340) with *Ashland Oil, Inc. v. Phillips Petroleum Co.*, a case appealed from the United States District Court for the Northern District of Oklahoma reported at 364 F. Supp. 6 (N.D. Okla. 1973) (*Ashland I*). (App. A468). *Ashland I* involved a claim for the reasonable value of helium produced in two plants in Texas. The facts of the *Grounds* and *Ashland* cases were, however, greatly dissimilar. There were different parties and the evidence on value introduced in each case was also substantially different. The cases were not consolidated for the purpose of making a determination of value or of judgment.

On appeal in *Ashland I*, the Tenth Circuit in an en banc opinion held that a work-back valuation method (price less cost of beneficiation) was the proper method

to use in determining the value of the helium constituent at the point and time of delivery. *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 554 F.2d 381 (10th Cir. 1977), *cert. denied*, 434 U.S. 921 (1977). (App. A429). The court remanded the case to the District Court for taking additional evidence. *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 463 F. Supp. 619 (N.D. Okla. 1978) (*Ashland II*). (App. A390). On appeal, the Tenth Circuit affirmed the value of $3.00 per Mcf arrived at by the District Court but remanded for an entry of judgment to include prejudgment interest. *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335 (10th Cir. 1979). (App. A385).

Nothing further occurred in *Grounds II* until after *Ashland II* had been considered by the Tenth Circuit. *Ashland I* and *Grounds II* had been argued to the Tenth Circuit on November 16, 1976, and the court filed its opinion in *Grounds II* five years later, *i.e.*, November 16, 1981. In the interim, without any notice to the parties, the court placed *Grounds II* on an "abated status" and then, by an order dated May 11, 1981, removed it from the en banc court and referred it to a three judge panel. (App. A330).

On November 16, 1981, the panel issued its decision in *Grounds II*, setting aside the valuation determination made by the District Court. *Northern Natural Gas Company v. Grounds*, 666 F.2d 1279 (10th Cir. 1981). (App. A1). The panel held that *Ashland* "was the law of the case" and that the work-back method was to be used to determine the reasonable value of helium content of the natural gas. This order was made notwithstanding extensive findings of fact by the trial court that such method in the *Grounds* cases was incapable of reasonable application. The court's decision did not refer to the

contract provisions between the lessee-producers and the Helex Companies. The opinion further directed the District Court to make a value determination based upon the work-back method, subject to a $2.00 per Mcf "floor" or minimum payment.

On January 19, 1982, the Tenth Circuit Court denied petitions for rehearing and suggestion for rehearing en banc filed by the Helex Group and by the Government. (App. A512).

REASONS FOR GRANTING THE WRIT

A. The Tenth Circuit Court Has Disregarded An Act Of Congress, And The Holding Of This Court In *Phillips Petroleum Company v. Texaco*, By Creating A Utility Type Rate Making Scheme, Voiding Contract Rights Of Petitioners In Violation Of Their Due Process Rights.

If the opinions of the Tenth Circuit Court are allowed to stand, Petitioners will be deprived of their contractual rights under two classes of contracts. The first class of contracts consists of the gas purchase contracts with producers executed after the enactment of the Helium Act Amendments of 1960, which contracts deal specifically with the helium constituent. The second class of contracts consists of the gas purchase contracts with producers - typical of those used in the industry - which have no special provisions relating to helium. The Tenth Circuit Court in *Grounds I* held the gas purchase contracts of both classes vested title in the pipeline companies to the helium constituent along with the rest of the gas stream. (App. A158). Yet, the Tenth Circuit held in *Grounds I & II* that both classes of contracts are void insofar as they provide for the purchase and sale of helium. The court reached this extreme conclusion by finding that a void exists be-

tween the Natural Gas Act, which gave the Federal Power Commission jurisdiction, *inter alia*, over the sale of natural gas for resale, and Section 11 of the Helium Act Amendments of 1960 which provides that the Natural Gas Act:

> shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas. . . . (App. A550).

Thus, the Tenth Circuit concluded in *Grounds I*:

> In our opinion the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants. Hence, the lessee-producers recover from the fund the reasonable value of the helium content of the processed gas and they in turn must pay royalty thereon to the landowners.

(App. A168).

The court found that this result was necessary for "satisfactory utility regulation." It is obvious that the Tenth Circuit felt it was dealing with the issue of rate regulation and not contract law. This is further apparent in its rejection of the moral of the folk tale of the Little Red Hen in the following words:[2]

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2. In support of the principle that equity does not take from those who earn it and reward those who silently stand aside and await the success of the enterprise, the Helex Group cited as authority the folk tale of the Little Red Hen. As quoted in the brief of the Helex Group: "You remember that I planted the wheat, and cut it, I threshed it and carried it to mill, I made the bread and baked it—and now all of you would help me eat it! No, indeed." V. S. Hutchinson, Chimney Corner Stories, 63, 65 (1925).

> The activities of the Little Red Hen were not those of a public utility, and neither the product nor the ingredients thereof were subject to governmental rate regulation. Therein lies the difference. . . . In our opinion private contract law and the principles applicable thereto are not controlling.

(App. A166).

Amplifying the decision of the Tenth Circuit in *Grounds I*, this Court held in *Phillips Petroleum Co. v. Texaco, Inc.*:

> In other words, the Grounds case simply held that payment for natural gas at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium constituent and cannot be asserted as a defense to a suit for the recovery of the value of that helium. . . .
>
> Texaco's suit for the reasonable value of the helium is, in effect, an action in quantum meruit, whose source is state law and not federal law.

(App. A499-500).

Thus, it would seem clear that while the Tenth Circuit has treated the cases as though they involved complex federal regulatory or utility issues, they in fact are simple cases involving quantum meruit under Kansas law. Notwithstanding the clear holding of this Court in *Texaco*, the Tenth Circuit in *Grounds II* treated the cases as if they were federal regulatory cases and provided a framework for price regulation, *i.e.*, a work-back valuation method with a $2.00 floor and a utility type rate of return to the pipelines and helium extractors. (App. A27).

In so holding the Tenth Circuit succeeded in accomplishing the judicial regulation of a commodity which Congress had stated in Section 11 of the Helium Act Amendments was not to be regulated under the Natural Gas Act. Moreover, by its failure to provide any other regulatory mechanism, Congress indicated that such commodity should be free of regulation.

Not only is there a lack of statutory authority for utility type rate regulation of helium, there is likewise no federal common law applicable thereto. In a very recent case this Court held unequivocably that there is no federal common law except in two special areas not here involved. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 450 U.S. 905 (1981). In the absence of any federal law, the state law must govern, whether statutory or common law.[3]

Since the Kansas Legislature has not elected to regulate helium, the decision of this Court in *Phillips Petroleum Co. v. Texaco, Inc.* applies, and the action is one under quantum meruit. The common law principle of quantum meruit does not permit recovery where rights are already protected under an express contract. *Hillyer v. Pan American Petroleum Corporation*, 348 F.2d 613,

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3. The situation in *Grounds* is analogous to the issue presented in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U.S. 507 (1947). In that case, this Court held that neither the commerce clause of the United States Constitution (Art. I, §8), nor the Natural Gas Act, prevented the operation of state law in areas of natural gas regulation not specifically preempted by the federal government. This Court said, "We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority." *Id.* at 520. This Court also observed, "The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage." *Id.* at 524. *See also Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1949); *Rice v. Board of Trade of City of Chicago*, 331 U.S. 247 (1947).

623 (10th Cir. 1965). Kansas follows the common law except as to those particular principles of that law that are abrogated by statute. *In re Frye*, 173 Kan. 392, 396, 246 P.2d 313 (1952). Thus, there can be no recovery under quantum meruit in the present case because the matters in issue are covered by express written contracts.

The principle of quantum meruit as applied under Kansas law clearly prohibits recovery as to the first class of contracts, which were agreed upon after arms-length negotiations. The language in each of these contracts is clear and unambiguous. Typical of the pertinent language in these contracts is that found in the contract with Cities Service Oil Company. The trial court's decision described it as follows:

> In Contract No. 152, the producers [Cities Service Oil Company] retained the option of extracting helium and liquefiable hydrocarbons, and promised that: "In the event Seller does not extract helium at the plant site or sites . . . or prior to initial delivery of gas to Buyer, Seller will release all further claim to helium contained in gas delivered to Buyer." [Contract No. 152, ¶12.3, p. 24]

(App. A112).

It is clear from the trial court's description that all of the sellers in this class of contracts were fully aware as of the time of executing them that helium had a value and that such lessee-producers for a valuable consideration paid by Panhandle agreed to either extract the helium or forego any claim against Panhandle for the value of the helium, accepting therefor the same price as for the other constituents of the natural gas stream. The trial court, however, did not enforce the clear language of the contracts, because of its belief that the opinion of the Tenth Circuit in *Grounds I* prevented it from doing so. (App. A113).

The Tenth Circuit Court in *Grounds II* also refused to consider the specific contract language. Although Petitioners urged such failure as the prime reason for granting rehearing (App. A523), the Tenth Circuit Court continued its persistent refusal to deal with the contractual provisions disposing of the helium issue.

Under another gas purchase contract, Hugoton Production Company gave Panhandle an unconditional release in exchange for a valuable consideration. (App. A610). The effect of the Tenth Circuit Court holding is to void the release. The release was executed on May 1, 1967, long after the passage of the Helium Act Amendments of 1960 and long after the extraction of helium had commenced. Hugoton Production and Panhandle had numerous claims and disputes with each other and this settlement was clearly intended, as evidenced by its unambiguous language, to release Panhandle:

> from all, and all manner of, action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, judgments, executions, claims and demands whatsoever, in law or in equity, that the said Hugoton now has, ever had, or may have by reason of any matter, cause or thing whatsoever from the beginning of the world up to and including the end of the day upon which this release is dated.

(App. A610-11).

If this release does not effectively release Hugoton Production Company's claim to be reimbursed for helium in the gas delivered to Panhandle, it would be impossible to prepare a release which would do so.

The rationale for recognizing the validity of the contracts insofar as they refer to helium is equally applicable to the second class of contracts which, though not mentioning helium, do in fact pass title to the helium constituent. Panhandle's gas stream contains approximately .4% helium. The effect of this Court's holding in *Phillips Petroleum Co. v. Texaco, Inc.* is that the FPC service rates apply only to the other 99.6% of the stream. By what authority may the Tenth Circuit disregard the price which the parties expressly agreed would apply to the .4% helium as well as to the remainder of the full stream? We urge that in light of *Texaco* the appropriate price for the helium would be .4% of the contract price—and this without regard to what has been paid for the regulated 99.6% of the stream. To hold that petitioners must pay some other price to be determined by the court based on "work-back" and allowing a return on investment is to engage in a type of utility rate regulation not authorized by Constitution, statute, or common law.

We suggest that in both classes of contracts, Panhandle and the producers were free to contract. Neither the Natural Gas Act nor the Helium Act Amendments of 1960 purported to preempt that activity or to make contracting with respect to helium illegal or ineffective. To deprive the parties of rights obtained by such proper commercial activities is to take their property without due process of law—the only process involved being that of unauthorized rate making by the courts.

The Fifth Amendment to the U.S. Constitution provides that no person shall be "deprived of life, liberty, or property without due process of law." This Court has declared on many occasions that contract rights are property rights entitled to protection under the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571 (1934). Fun-

damental fairness requires that the facts of each materially involved transaction be specifically examined and decided. The issues concerning the facts of petitioner's contracts have never been decided and petitioners have been denied their due process rights. See *Morgan v. United States*, 298 U.S. 468, 478-82 (1936).

B. The Circuit Court Should Not Be Permitted To Write Contracts De Novo For The Benefit Of Third Parties When The Trial Court Did Not Consider Such A Theory And The Trial Court's Findings Of Fact Directly Negate The Application Of Any Such Theory.

(1) The Circuit Court Blatantly Violated Rule 52(a) Of The Federal Rules Of Civil Procedure.

The Tenth Circuit Court held that the contracts between the Government and the helium extractors, including National Helium's contract, created contracts for the benefit of third party producers and landowners to the extent of agreeing to pay such producers a minimum price of $2.00 per Mcf for the helium. (App. A18). The trial court had determined that the $2.00 figure was merely an estimate of the cost of helium to the Government if the Government should decide to build its own plant rather than contract with the Helex Companies for such helium. The entire finding of fact on this matter is stated in the trial court's opinion in *Grounds I* as follows:

> The United States negotiated the above unit prices in each contract on the basis of costs comparable to those it would incur in a government-owned plant located at the same place and in the same circumstances, adding thereto those costs of doing business applicable only to private industry, the cost of taxes, insurance, and a return on private capital. As one of the costs

> of operating a government-owned plant, the United States included in its cost build-up a payment of $2.00 for helium contained in natural gas delivered at the extraction plant for processing. This separation of two dollars of the unit price as applicable to the cost of helium contained in natural gas to be processed for its extraction does not appear in any contract itself. It appears only in evidence which reflects the manner in which the United States reached its own cost estimates to form a basis for actual contract negotiation. *The figure reflects no more than the estimate of the Bureau of Mines of the cost it would probably incur, in the operation of its own extraction plant, to acquire helium extraction rights from a natural gas stream.* (Emphasis added).

(App. A238-39).

The trial court never considered a third party issue or theory and no evidence was introduced as to the intent of the parties to create a third party beneficiary contract. The contracts themselves made no mention of this $2.00 figure or of any third party beneficiary. (App. A613).

The contracts did reflect that the Government was paying National Helium 91 cents per Mcf for the helium and other shrinkage and for the fuel gas. (App. A627). This sum is substantially less than the $2.00 per Mcf price seized upon by the Tenth Circuit.

It is obvious from the foregoing that the Tenth Circuit has de novo created a contract for the benefit of the producers and landowners. This is not permitted under Rule 52(a) of the Federal Rules of Civil Procedure. That rule states in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts

> specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless *clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. (Emphasis added). (App. A553).

Thus, the findings of fact by the trial court are deemed to be presumptively correct.

In determining whether the findings of fact of the trial court are "clearly erroneous", an appellate court cannot consider and weigh the evidence de novo. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Wright and Miller Federal Practice and Procedure: Civil § 2585 (1971). Additionally, the mere fact that on the same evidence the appellate court might have reached a different result does not justify setting aside the findings of fact of the trial court. *Bianchini v. Humble Pipe Line Company*, 480 F.2d 251 (5th Cir. 1973). As stated by the court in *Panaview Door & Window Co. v. Reynolds Metals Co.*, 255 F.2d 920 (9th Cir. 1958): "The Federal Rules of Civil Procedure give this Court no power to make new independent findings upon evidence which *this* Court did not hear. Trial de novo is not permitted under our present system, except perhaps in admiralty." *Id.* at 926. (Emphasis added).

(2) The Circuit Court Ignored Applicable Kansas Law With Respect To Third Party Beneficiary Contracts In Violation Of *Erie R. Co. v. Tompkins*.

No federal statute creates a contract for the benefit of the producers and landowners and the Tenth Circuit Court may not under the guise of federal rate making, or through creating a federal common law, provide such

a contract for the benefit of third parties. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 450 U.S. 905 (1981).

Under applicable state law which was not considered by the Tenth Circuit Court and which must be applied under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), there could be no contract for the benefit of the producers and landowners.

The test for determining the existence of third-party beneficiary contracts has long been established in the State of Kansas. Both parties must have intended to make a contract for the benefit of a third party. *Burton v. Larkin*, 36 Kan. 246, 13 P. 393 (1887). In the instant case, there was no evidence that either party intended a contract for the benefit of the landowners or producers.

It is not proper for a court to imply a contract for the benefit of a third party. The intent to benefit a third party must be clearly expressed in the contract. As is stated in *Martin v. Edwards*, 219 Kan. 466, 473, 548 P.2d 779 (1976), "Contracting parties are presumed to act for themselves and therefore an intent to benefit a third person must be clearly expressed in the contract." There was nothing in the involved contracts between the Government and petitioner National Helium stating any intent to benefit any third parties.

The burden of proving the existence of a third party contract rests with the third party seeking to benefit from the contract. *Hartford Fire Ins. Co. v. Western Fire Ins. Co.*, 226 Kan. 197, 597 P.2d 622 (1979). The claimants here introduced no evidence in the trial court that the contract between the Government and petitioners was for their benefit. The trial court made no findings of fact reflecting any intention on the part of the contracting parties to benefit any third parties.

Under the facts of this case, as determined by the trial court and under the applicable law of the State of Kansas and elsewhere, there was no contract for the benefit of third parties and the holding of the Tenth Circuit Court in creating such a contract violates the doctrine of *Erie R. Co. v. Tompkins.*

C. The Circuit Court, Whether Through The Rationale Of The "Law Of The Case Doctrine" Or Otherwise, Should Not Be Permitted To Apply Findings Of Facts And Conclusions Of Law Determined In One Case To Another Case Where:

(1) The Parties Involved In The Two Cases Are Not The Same;

(2) The Factual Considerations Of The Two Cases Are Vastly Different.

The Tenth Circuit Court completely disregarded comprehensive findings of fact by the trial court, including a finding that the work-back method urged by the lessee-producers was unreasonable as a determinant of value. The Tenth Circuit Court held that the work-back method used to determine the value of the helium involved in the proceeding in *Ashland I* must be applied in this case under the theory of the "law of the case". (App. A13).

The "law of the case" doctrine concerns the continued application of a rule of law previously determined in a case at bar and could have no application to methods of determining value in two different cases. *Chicago, Rock Island & Pacific Railroad Co. v. Hugh Breeding, Inc.*, 247 F.2d 217, 223 (10th Cir. 1957); *Champlin Refining Co. v. Commissioner of Internal Revenue*, 123 F.2d 202, 204 (10th Cir. 1941); *White v. Murtha*, 377 F.2d 428, 431, 432 (5th Cir. 1967); 1B, Moore's Civil Procedure, § 0. 404(1), 403.

The parties in the present case are different from the parties involved in *Ashland*. *Ashland* involved only approximately 18 wells in Texas, all within close physical proximity of one another. (App. A472-A484). The present case involves far in excess of one thousand wells spread over a four state area. (App. A39-A98). The natural gas produced from the Ashland wells had high contents of helium and were piped to two plants both owned by a single operator. (App. A472-484). The gas from the wells in the present case have a wide variation in helium content, the average content is far less rich and the gas is transported long distances to several different plants with different owners and with different capital investments and operating costs. (App. A39-A98). The evidence introduced at the two trials demonstrated vastly different facts affecting the value of the helium involved. It is apparent that the application of the work-back valuation method would result in a different value being established for the helium produced at each plant, a bizarre result indeed.

Judge Doyle, in his dissenting opinion in *Ashland I*, noted that the trial record in *Grounds II* was superior to th produced in *Ashland I*. (App. A466). Thus, we sugg the District Court was correct in its conclusion that the facts in *Grounds II* proved the existence of a market for helium at the point and time of delivery. From these facts, the trial court could and did determine the reasonable value of the helium constituent. (App. A100).

All of the differences in parties and facts from *Ashland* to *Grounds* make it clear that the application of the "work-back" method as determined to be the "law of the case" in *Ashland* is totally unreasonable and impossible of uniform or fair application in this case. This would be true

whether the court denominates the doctrine as "law of the case" or "stare decisis" or otherwise. The rights of the parties in this case cannot be fairly determined in another case where the controlling law, facts, and the parties are not the same. *Champlin Refining Co. v. Commissioner of Internal Revenue,* 123 F.2d 202, 204.

While we have demonstrated in Part A hereof that no further valuation of helium is required in light of the express contracts, we urge that if valuation is to be undertaken the method utilized by the trial court in *Grounds II* is the most appropriate method. It accommodates the facts determined by the trial court. Further it is totally improper, as the Tenth Circuit Court has ordered, to determine a quantum meruit value based on costs or on some rate of return on investment. The proper issue is the reasonable market value. This is what the trial court determined. See *Cities Service Gas Co. v. United States,* 580 F.2d 433, 440 (Ct. Cl. 1978); *Cities Service Gas Company v. United States,* 500 F.2d 448, 457 (Ct. Cl. 1974).

CONCLUSION

The present litigation involves only helium sold to the United States for conservation purposes. There remain pending in federal and state courts a number of cases involving the same issues with respect to private sales of helium. The litigants in those cases would benefit from a clarification by this Court of the issues presented herein.

Petitioners concur in the argument made by the Cities Service Companies in their petition for certiorari filed in this cause contemporaneously herewith concerning the error of the Tenth Circuit Court of Appeals in abating

the cases and terminating the en banc court 4 1/2 years after submission without notice and hearing. For those reasons and for the reasons set out herein, this petition for certiorari should be granted.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS PANHANDLE EASTERN PIPE LINE COMPANY AND NATIONAL HELIUM CORPORATION IN REPLY TO BRIEFS OF LESSEE-PRODUCER RESPONDENTS AND LANDOWNER RESPONDENTS AND TO MEMORANDUM OF THE UNITED STATES

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STATEMENT

The various Lessee-Producer Respondents, the Landowner Respondents and and the United States have each filed briefs addressed collectively to the three companion cases filed by the Helex petitioners. Similarly, the petitioners, Panhandle Eastern Pipe Line Company and National Helium Corporation, reply collectively to such respondents and the United States concerning arguments first raised in their briefs.

ARGUMENT

Finality of Previous Decisions

In various ways and with varying degrees of enthusiasm the Lessee-Producer Respondents urge that because of the numerous decisions by the lower courts and the previous denials by this court of petitions for certiorari, the issues relating to liability have become final and petitioners are not at liberty to seek further consideration by this court.[1]

The Respondents should know that the ball game is not over until the final whistle is sounded. The Supreme Court has repeatedly emphasized that its denial of certiorari, without comment, carries no implication of the Court's opinion on the merits of the case. In *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1949), the Supreme Court revealed some impatience in having to again repeat this well known principle. The Court said:

"Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four

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1. Brief of Amoco et al, p. 5, Brief of Gulf Oil Corporation, p. 8 et seq. Brief of Mobil et al., p. 13.

members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again, again and again the admonition has to be repeated."

The case of *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1915) applied this principle in a case which had been bifurcated in two phases similar to the present litigation. The case involved alleged violations of a trademark and was divided into a first phase relating to liability and the right to an injunction and a second phase relating to damages. After denying certiorari following the first phase, the Court granted the petition following trial of the second phase. The respondents made the same contentions with respect to finality as are being made by Respondents here. The Court declared:

"It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings." 240 U.S. 251, 258 (1915)

See also *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973).

In addition to the need for reviewing errors of the Circuit Court committed in the liability phase, this court should grant the petition in order to review additional errors committed in Phase II. In none of the previous petitions for certiorari in this litigation or in related litigation have the following issues been presented.

(1) Whether the Circuit Court failed to follow *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974) by applying federal law rather than state law with respect to the doctrine of quantum meruit.

(2) Whether the Circuit Court may properly imply a contract for the benefit of third parties where the issue was not presented to the trial court but the trial court's findings negated the existence of such a contract.

(3) Whether the findings of fact and conclusions of law in one case are binding on parties to another case through the law of case doctrine where the significant facts are not the same.

(4) Whether the Circuit Court deprived the parties of due process by the manner in which the case was managed.

Third Party Beneficiary Issue

The third party beneficiary issue is critical because it is the only theory which the Court has used to support a "floor" in the work-back methodology. The existence of the floor makes a mockery of work-back and prevents a true application of the procedure. It permits the use of work-back but only so long as it benefits the Lessee-Producers and Landowners. If it should reveal that one or more Helex companies had little or no profit, they must nevertheless pay the minimum value. If the possibility

of little or no profit did not exist, there would be no need for a floor.

The Respondents have considerably confused the third party beneficiary issue by attempting to argue the merits of $2 per Mcf as a minimum value rather than to face the issue of whether the Circuit Court may imply a contract for their benefit under the circumstances here involved. (Brief of Amoco et al. p. 7 and 8. Brief of Mobil et al. p. 16 and 17. Brief of Landowners, p. 7 et seq.)

In further confusion of the issue, the Landowners seem to argue that even if the Circuit Court was in error in writing a de novo contract for the benefit of third parties, the Helex companies were not really harmed because the $3 indemnity provision (quoted at Joint Appendix A13 of the extended argument in their brief) constitutes a firm obligation on the part of the Helex companies for their benefit. (Landowner Br. p. 9 and 10.) The net of this argument is that an agreement for limited indemnity against possible claims is an acknowledgment of the validity of those claims. If this were to be the law, it would be a sudden death for all future indemnity agreements.

In the hope of reducing the confusion, we list here pertinent facts which we believe to be uncontroverted and which together demonstrate that the Circuit Court overextended itself in finding a contract for the benefit of third parties.

(1) The issue of whether the $2 per Mcf, considered by the United States in negotiations, constituted a contract for the benefit of third parties was not presented to the trial court. (See Gulf Brief p. 7)

(2) The Trial Court found that the $2 per Mcf: "appears only in evidence which reflects the manner in which the United States reached its own cost estimates to form a basis for actual contract negotiation. The figure reflects no more that the estimate of the Bureau of Mines of the cost it would probably incur, in the operation of its own extraction plant, to acquire helium extraction rights from a natural gas stream." (Joint Appendix A239)

(3) The $2 figure does not appear in any contract.

(4) The Circuit Court did not find an express third party agreement but rather implied an agreement relying primarily on a memo by an agency not having a part in the negotiation process. (Joint Appendix A15)

(5) The Helex companies have had no opportunity to rebut the evidence relied upon by the Circuit Court, since the theory was first advanced by the Circuit Court in the opinion for which review is sought in these proceedings.

Memorandum of the United States Not Opposing Petitions for Writs of Certiorari

With the possible exception of the issue of federal versus state law, the United States agrees with the petitioners concerning the law applicable to the important issues in this litigation. However, for a variety of reasons the government refrains from urging this court to grant the petitions. We believe the Supplemental Brief of Northern Natural Gas Company et al. accurately corrects the factual discrepancies in the government's brief and ap-

propriately responds to the concerns of the United States. We will not duplicate those statements here.

However one matter of special meaning to these petitioners is dealt with in a casual manner in footnote 7, p. 9 of the United States memorandum. This refers to gas purchase contracts between Lessee-Producers and Panhandle Eastern Pipe Line Company which were made well after public knowledge of the helium conservation program and specifically deal with the ownership of the helium constituent of the gas stream. (See discussion, Petition for certiorari, case No. 81-1920, p. 13 and 14. The contracts appear at Joint Appendix A578 through A607.) The contracts represent an attempt to settle in advance by special contract provisions the very issues of liability which are involved in this litigation. It would appear *prima facie* that there is no lawful reason why parties cannot do this. The United States attempts to brush this important matter under the carpet by saying: "The district court's treatment of these six contracts, however, inextricably relies upon the court of appeals' original rationale for finding the Helex Companies liable for the reasonable value of the helium component of the gas stream." The rationale of the Circuit Court with respect to the liability issues, as the rationale applies to oil and gas leases and gas purchase contracts made before general knowledge of the value of helium in natural gas and with no special reference to helium, simply has no application to these specially negotiated contracts. To support the holding of the Circuit Court as applied by the trial court is to conclude that there is no way knowledgeable business people can sit down in anticipation of a known liability issue and deal with it by contract. This matter ineluctably requires review by this court.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS RALPH GROUNDS, ET AL. (LANDOWNER GROUP) IN OPPOSITION

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BRIEF OF RESPONDENTS RALPH GROUNDS, ET AL. (LANDOWNER GROUP) IN OPPOSITION

STATEMENT

Respondents, Ralph Grounds, et al., appearing individually and as representatives of class members collec-

tively referred to as landowner-lessors or the landowner group, have, themselves, filed a Petition for a Writ of Certiorari (No. 81-1919) to review the same judgment and opinion that is sought to be reviewed in these three certiorari proceedings.

In the view of Respondents, the three Petitions are sufficiently similar as to justify this single brief in opposition to all of them.

These landowner Respondents believe that the Statement of the Case contained in their own Petitions for Writ of Certiorari (No. 81-1919) is equally applicable to this Brief in Opposition. Additional discussion of the facts relating to the third-party beneficiary nature of the processing contracts between the Helex Group and the government arising out of the Helium Act Amendments of 1960 are set out below in connection with discussion of Petitioners' positions concerning the same.

PETITIONERS' REQUEST FOR REVIEW BASED UPON PROCEDURAL ERRORS ARE WITHOUT MERIT

These landowner Respondents themselves experienced the disconcerting effects of long delays below and of the shuffling back and forth of this *Consolidated Helium* or *Grounds* case below with related proceedings in the wholly separate and different *Ashland* case. Respondents are, consequently, sympathetic with Petitioners' feelings regarding such procedures, but, as we shall demonstrate, such procedural matters did not, in any way, prejudice the rights of the Helex Group—only the rights of landowners were sacrificed by the unprecedented procedure of the court below.

Actually, a careful reading of the three instant Petitions of the Helex Group reveals that Petitioners dwell on such procedural matters only to highlight and furnish a sympathetic background for their own argument dealing with the relationship between this case and the separate *Ashland* case. The Helex Group has seized upon and repeatedly emphasized the unfortunate and inapposite use by the court below of the phrase "law of the case" in order to obscure the applicable *stare decisis* effect of the *Ashland* decisions insofar as they apply to the "value less expense or work-back" valuation method directed by the court below to be used in this case on remand (App. p. A27) and, also, to obscure and conceal the fact that the Helex Group has already received full review of both law and fact questions on such issues by the court below in these instant separate *Consolidated Helium Cases*, sometimes referred to as the *Grounds* case.

It is undisputed that the interests of the Helex Group were fully represented throughout all of the proceedings in trial and on appeal in the *Ashland* case. The various opinions in the *Ashland* case themselves reveal that those who were actually present as parties to the *Ashland* trials and appeals, a lessee-producer and a processing helex company, were adverse litigants presenting an honest and antagonistic assertion of rights with respect to the questions sought to be raised in the three instant Petitions. The question remaining after the *Ashland* opinions was the extent to which the *Ashland* decisions and judgments had a *stare decisis* effect on these *Consolidated Helium Cases* insofar as they involved such issues so hotly disputed by adverse parties in *Ashland*. Consequently, at the beginning of its review of the record in these proceedings, the court below stated:

> "The record does not evidence any material significant differences between the contracts and contractual relationships existing between the parties involved in the Kansas and Oklahoma proceedings." (App. p. A12)

The court below then discussed the possible differences in evidence in the Kansas (*Consolidated Helium*) and Oklahoma (*Ashland*) cases relating to those issues. (App. pp. A12-14) Only after completing its review of these relevant differences as reflected by the records in both the *Ashland* case and in this *Consolidated Helium* case, did the court below state:

> "Accordingly, the work-back method *applies with full force in the case at bar.*" (App. p. A14, emphasis supplied)

Only then, after such full review, did the court below determine that the district court should, on remand, employ the "work-back" method set out in its opinions in *Ashland* as the proper method of determining the value of the processed helium. (App. p. A14) It is apparent that what the court below actually did is just what courts traditionally do in examining the *stare decisis* effect of a decision in a previous case when disposing of a subsequent case before them involving different facts, parties, and circumstances.

These landowner Respondents readily concede that technical "law of the case" was not applicable. The gratuitous, irrelevant, and careless references to the "law of the case" in the opinion below, even when made in the middle of an examination of the *stare decisis* effect of *Ashland* (App. p. A13), and even to the extent of discussing authority as to the applicability of "law of the case" (App. p. A14), merely obscure what the court actually did, as

is otherwise completely demonstrated by its opinion. It properly applied the rule of *stare decisis* to those issues now raised by Petitioners.

The petitioning members of the Helex Group have had a complete review in these cases as to the issues sought to be reviewed by them. They simply do not like the result. They have had their many days in both trial and appellate courts and are not able to point to any errors of law or fact in the review by the court of appeals sufficient to warrant the attention of this Court. Instead, they rely wholly upon the gratuitous and irrelevant references in the opinion below to the "law of the case" as sufficient to deserve this Court's attention.

This is in stark contrast with what happened below to these landowner Respondents. Neither law of the case, *stare decisis*, *res adjudicata* nor any other doctrine of judicial repose are applicable to the landowners' constitutional complaints relating to the reasonable royalty issue raised by these responding landowners in their own Petition in No. 81-1919. Unlike the full review accorded by the court below to the claims of the Helex Group, the landowner-lessor claims were held below to have been decided in the *Ashland* proceedings to which no landowner-lessors were ever parties or ever presented evidence and in which non-adversary proceedings the court below purported to construe its prior *Grounds I* decision as disposing of all royalty claims, although such claims were not, and could not have been, justiciable, thus making law-of-the-case, *stare decisis* or any other rule of judicial repose wholly inapplicable to avoid Article III and Fifth Amendment due process requirements of the Constitution. (See Petition in No. 81-1919, pp. 9-12, 19-23).

As we have indicated above, the court below fully reviewed the trial court's factual findings and legal con-

clusions as to all of the issues raised by the Helex Group in their Petitions here. (App. pp. A10-16, A17-24) In direct contrast to such fair treatment afforded to the Helex Group, the court below wholly ignored the extensive findings and conclusions made by the trial court (App. A118-119) upon the evidence adduced as to the reasonable royalty issues on the only occasions when the landowner-lessors were parties present and in a position to put on their evidence or argue justiciable issues. The oblique one-paragraph reference by the court below to the reasonable royalty issue (App. pp. A16-17) does not mention a single one of such findings of the trial court nor a single one of the trial court's conclusions based thereon. In the only setting first ripe for review of those issues, the findings of the trial court, the evidence on which they were based, and the trial court's conclusions on the issues were completely ignored as though such evidence, findings, and conclusions had never existed.

In contrast, the three instant Petitions of the Helex Group are nothing more than attempts to make it appear that the careless language and unusual procedures of the court below resulted in the same unfair treatment to them as was suffered by the landowner-lessors.

HELEX GROUP PETITIONERS ARE NOT AGGRIEVED BY THE $2.00 "FLOOR" OR MINIMUM PAYMENTS REQUIRED BY THE COURT BELOW BECAUSE THE MINIMUM SHOULD HAVE BEEN THE ULTIMATE $3.00 THIRD-PARTY BENEFICIARY AMOUNT SET FORTH IN THE WRITTEN CONTRACTS WITH THE GOVERNMENT

Petitioners are correct in pointing out that the approximate $2.00 per Mcf figures forming the basis for the minimum payment to third-party beneficiaries required by the court below is not mentioned in the helium processing contracts between the Helex Group and the government, but was used as a part of the cost build-up leading to the base per Mcf prices negotiated.

The $2.00 amount is, in each instance, however, money had and received by the processor for the benefit of third-parties. The $2.00 amount is not mentioned in the contract, however, because in the reduction to writing, the $2.00 became encompassed and subsumed into a larger ultimate $3.00 per Mcf third-party beneficiary amount to which the landowner-lessors and the lessee-producers are, in any event, entitled.

In making their attack on the $2.00 minimum, the Helex Group finds it necessary to suggest, contrary to fact, that they did not receive the $2.00 they bargained for and received as a part of the initial base price. Such initial base price has already been paid to them, and it includes the $2.00. The Petitioners also find it necessary to interlace their Petitions with a variety of bizarre and inaccurate statements at variance with the evidence in this case as it relates to the third-party beneficiary nature of their contracts with the government negotiated pursuant to the Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C.

Sec. 167 *et seq.* (App. pp. A546-552), hereafter referred to as the Act.

We have in an Appendix to this Response particularized, for the Court's information, many of the statements contained in the three instant Petitions which are at variance with the facts as developed in the evidence and record below. The Appendix also contains a rather extensive recitation of undisputed facts at variance with the factual statements of the Petitioners, including an analysis of the Act and its legislative history and of the actual wording of the Helex contracts with the government, insofar as such matters relate to the arguments made by Petitioners.

As was properly noted by the court below, "the intent to benefit the third-party is generally controlling and it is to be gathered from a construction of the contract in the light of all surrounding circumstances showing such an obligation," citing cases in support thereof. (App. p. A18) There was an abundance of evidence of surrounding circumstances showing such intent. Indeed, the contracts are so clear as to such intent that no amount of extraneous evidence to the contrary (which does not exist) could possibly overcome the plain contractual language of intent. Third-party beneficiaries were actually referred to in the price provisions of the processing contracts, and the third-party beneficiary amount was clearly earmarked as such. The review of some of the evidence and facts set out in the Appendix to this Response demonstrates the compelling basis for such expressed intent.

In summary, the helium processor and the government, in each instance, entered into a single contractual arrangement providing for the removal of helium by the processor for delivery to the government and for a method of determining the identity and extent of outstanding third-

party interests in "all rights necessary or incident to the acquisition" of the helium to be removed and so delivered (*See* Article 3 of the Act, App. p. A542) and a method of assuring the government that such rights would ultimately be acquired and paid for by the helium processor itself, with assistance from the government under a price escalation clause contained in the contract.[1] Included in the contract was a definition of affiliates of the processor who might own interests in helium as lessee-producers or otherwise. This definition, as applied, excluded such affiliates, along with the contracting processor, from qualifying as third-party beneficiaries. The payments and other contractual considerations under the package agreement included all considerations for helium interests which the processor or such affiliates might possess or own and all compensation for the helium removal services to be performed by the processor. The contracting processors were, under the contracts, able to assure themselves of negotiated minimum revenues (regardless of the amounts required to be paid to third-parties for helium interests) together with other benefits, including the possibility of substantially reducing their costs through the incidental recovery of hydrocarbons liquified through the cold-temperature helium removal process. The basic process had been used many years by the government during the time of its helium monopoly. The process takes only a few seconds to perform and is wholly physical, rather than chemical, in nature.

While the value of the conservation helium involved has not yet been determined in this case in accordance

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1. As accurately pointed out by the court below, "[w]hen the United States and the Helex companies contracted they were fully aware that the 'postponed' knotty legal problems of title and accounting would, of certainty, confront them." (App. p. A19)

with the Congressionally mandated standard,[2] what follows in the body of this Response demonstrates that the ultimate entitlement of the third-party interest is a minimum of at least an approximate $3.00 per Mcf of helium under ordinary principles of restitution and quasi-contract. The $3.00 figure is not found, as such, in the processing contracts, but the approximate $3.00 amount is identified and specified as a percentage of a particularized part of the initial base contract price, and when that percentage is so applied, the $3.00 figure is an exact amount to which the landowner-lessors and producer-lessees are entitled as the third-party beneficiaries mentioned in the processing contracts.

It is apparent from the nature of the contracts and cannot be disputed that if the third-party helium interest is ultimately determined to have a value of more than the approximate $3.00 per Mcf amount specified to be paid by the processing contractor to third-parties, the landowners and the lessee-producers, who have now been identified as those third-parties, are entitled to be paid at least that $3.00 amount, strictly as third-party beneficiaries.

But, in theory at least, the interests of the third-parties could ultimately be determined to have a value less than $3.00 per Mcf of helium. It is the position of responding landowners that, even in that event, under established principles of restitution and quasi-contract, as a matter of law, the Helex Group will be unjustly enriched to the extent of the benefits conferred upon them by any judgment valuing the outstanding third-party conservation helium interest any less than they contractually warranted to pay, since a reduction in or release of such liability is

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2. "*terms and prices determined* to be *commensurate* with the fair market value." Sec. 3(a)(2) of the Act (App. pp. A542-543)

equivalent to receipt of a positive, uncompensated benefit. *Olwell v. Nye & Nissen Co.*, 262 Wash. 2d 282, 173 P.2d 652, at 653 (Wash. 1946).

> "The term 'benefit', for purposes of restitution, denotes any form of advantage received, which is capable of having its value measured, and it accordingly includes an advantage of being saved from an expense or loss. Restatement, Restitution, §1, Comment b." *Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493 at 498 (8th Cir. 1955).

The contracts are basically processing agreements, but in order to meet Congressional guidelines and provide for the ultimate determination of the extent and value of third-party interests in helium, to be eventually paid for by the processors themselves, the contracts are couched in terms of purchase and sale of helium, with the government and the processing contractor agreeing among themselves as to their respective obligations to provide funds for the ultimate purchase price to be paid third-parties by the processing contractor. The contracts are still executory as to ultimate price as to all helium removed and delivered.

Accordingly, we look to the price provisions of the contracts to demonstrate landowner Respondents' position that the three processing groups are not aggrieved by the $2.00 per Mcf minimum payments required of them by the court below because the minimum should have been the expanded approximately $3.00 per Mcf third-party beneficiary amount identified, set forth and prescribed as the amount in the written contracts between the government and the processors.

Each processing contract sets forth a beginning per Mcf unit price based upon the amount of helium removed and delivered. In each case this base unit price was

divided by the contracts into two parts. Part 1 of each unit price was nominal in amount and specified all of the cost factors for which it represented compensation.

Part 2 of the initial unit price amounted to substantially all of the total unit price and was to be periodically adjusted in accordance with changes in the wholesale price index during the life of the contract.

Each contract further provided, in another escalation provision, that, in addition to all other payments above mentioned, the government would reimburse each processing company all amounts paid in satisfaction of approved or judicially-determined third-party claims to any interest in the helium, provided that each processing company was required to first pay to such third-parties a specified percentage of Part 2 of the unit price amounting in each instance to the $3.00 figure aforesaid.

These percentages of the Part 2 unit prices, so required to be devoted to satisfaction of third-party claims, were the only costs specifically identified in Part 2 unit prices. Such percentages of Part 2 of the unit prices result in average per Mcf identified amounts as to each processing company as follows during the periods in question:

National	Cities	Northern
$3.12	$3.13	$3.11

The processors have already been paid these respective amounts as part of the base contract prices out of which they are carved. It is these figures that are referred to as the approximate $3.00 amount throughout these proceedings. Whether the percentages of Part 2 unit prices, designated for satisfaction of third-party helium claims, are considered as (1) a payment to the processing companies and their affiliates for the cost of helium if all third-

party claims could be avoided, or (2) as a partial prepayment for helium rights required to be purchased from third parties, or (3) as a payment for the sharing by the helex companies of a contingent liability of indeterminate magnitude, the funds in any case, designated therefor constitute benefits to the helex companies directly attributable to the conservation helium.

If the specified portions of the contract prices assigned to satisfaction of third-party claims are all required to be paid to third-parties by the helex companies (plus any additional amounts required for complete satisfaction of such claims) then the helex companies will have received three definite benefits. They will have (1) satisfied their legally-imposed obligations to third parties, (2) fulfilled their conditional title warranty and indemnification obligations assumed for the benefit of the government in their contracts, and (3) qualified for reimbursement from the government of all third-party helium payments made by them in excess of the specified contract percentages.

On the other hand, if the liability of the processing companies for third-party helium claims were to be limited to amounts less than the designated contract price percentages (approximately $3.00 per Mcf), there are also three specific benefits resulting to the helex companies. As in the first instance, they will again be relieved of third-party claims created by law and will also have satisfied their contractual warranty and indemnification obligations as to unencumbered title to the helium. However, the third benefit changes from a right to receive reimbursement for necessary third-party payments in excess of $3.00 per Mcf to a right to retain that portion of the $3.00 remaining from any valuation of third-party claims less than $3.00 per Mcf, resulting in retention of funds attributable to third-party claims to helium, but free of such claims, and also free

of any further obligation to the government in connection with warranty of title to the helium.

Accordingly, the petitioning Helex Group cannot be aggrieved by the $2.00 floor required by the court below because the minimum should have been the expanded $3.00 per Mcf third-party beneficiary amount agreed to between the Helex Group and the government.

Respectfully submitted,

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APPENDIX

In their petitions, the Helex Group assert that there was no evidence as to the intent of the government and the members of the Helex Group with which it contracted to create third-party beneficiary contracts and that the contracts were intended to inure solely to the benefit of the Helex Group and did not mention any third-party beneficiaries (pp. 7, 17, 19 of the Petition in 81-1920, pp. 10, 15-16, 17 of the Petition in 81-1921); that members of the Helex Group made an unconditional warranty of title to the helium to be delivered to the government (pp. 3, 10 of Petition in 81-1921); that the contractual arrangements between the members of the Helex Group and the government as to payment of third-party claims was a mere indemnification agreement, with the government doing the indemnifying, and was not a price escalation clause for the benefit of third-parties (pp. 3, 7, 9, 9-10 of Petition in 81-1921 and pp. 4, 22, 23 of Petition in 81-1922); that the Helex Group believed they would not be required to pay anybody anything by reason of removal of the helium for delivery to the government by them (p. 16 of Petition in 81-1921); that the contracts between the Helex Group and the government contained a fixed per Mcf amount for helium payment with only a slight cost of living escalation and were not open-ended so as to include payment of helium value to third-parties and that the amount claimed by third-parties exceeded a fund (the amount paid and to be paid by the government to the processors) over which the court had jurisdiction (pp. 3, 7 of Petition in 81-1922, p. 7 of Petition in 81-1920); that the court below created de novo a contract for the benefit of producers and landowners (p. 17 of Petition in 81-1920 and p. 17 of Petition in 81-1921); that no federal

statute creates a contract for the benefit of producers and landowners (p. 18 of Petition in 81-1920) and that the third-party beneficiary issue had never been presented to or considered by the trial court (pp. 13, 20 of Petition in 81-1922).

Such erroneous statements of the Helex Group stem from a complete failure to face up to the nature and exact language of the four conservation contracts between the United States and members of the Helex Group. Likewise ignored are the Helium Amendments of 1960, 74 Stat 918, 50 U.S.C. Sec. 167 et seq. (App. pp. A540-552), herein referred to as the "Act," pursuant to which and under the authority of which the processing contracts were entered into.

Legislation previous to the Act (Section 161, Acts March 3, 1925, c. 426, Sec. 1, 43 Stat. 1110; March 3, 1927, c. 355, 44 Stat. 1387; September 1, 1937, c. 895, 50 Stat. 885, formerly 50 U.S.C. §161), did not grant authority to condemn helium-bearing gas already produced or the rights necessary or incidental to the removal and delivery of helium therefrom, condemnation being limited to lands or interests therein, including leases. Since the conservation program contemplated the acquisition of helium after its removal from its place of deposit in nature, authorization was for the first time granted in the Act to condemn helium, helium-bearing gas, or helium gas mixtures, wherever located, and all other rights necessary or incidental to the acquisition of helium, natural gas or mixture, the Act introducing the unusual concept of specifically authorizing condemnation of all necessary personal property, tangible or intangible, including contract rights, of whatever description, situs or location under law. Secs. 8(a) and 3(a)(2) of the Act (App. pp. A549, 542)

All rights which are to be acquired by the United States under the four contracts[1] entered into between the government and Northern (August 15, 1961, App. pp. 654-659), Cities Service (August 22, 1961, App. pp. A657-659), National Helium (October 13, 1961 App. pp. A613-659), and Phillips (November 13, 1961) are rights which could have been acquired by condemnation under such newly-instituted and unusual condemnation authority, with compensation for the condemnation of the helium or such incidental or necessary rights to be measured by *terms* and *prices* to be *commensurate* with the fair market value. Sec. 3(a)(2) of the Act (App. pp. A542-543). The Secretary of the Interior had the power to acquire by selective, particularized condemnation all rights of every nature, tangible or intangible, which he actually will acquire when the processing contracts are fully carried out as to helium already removed. As indicated by the unusual yardstick of compensation, above quoted, Congress was not content with leaving the measure of required payment to the usually statutorily undefined requirements of "just compensation" under the Constitution. The reasons for the action by Congress in this regard is apparent from the statutory history of the Act.

Congressional intent in this regard is important, even though this is not a condemnation case and the United States is not an indispensible party. This is so because the Secretary of the Interior acted under the Act when

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1. Provisions of the contracts are set out in the Joint Appendix. The contract with Panhandle's processing affiliate, National, petitioner in No. 81-1920, appears at App. A615-653. Parts of the contracts with the Cities Service and Northern Natural affiliates, petitioners in Nos. 81-1922 and 81-1921, are contained in the Joint Appendix (pp. A654-657, A657-659). The Phillips contract is contained in the record in the *Ashland* case. Since the contracts are identical as to matters relevant here, we will make appendix references to the contract with National, Panhandle's processing affiliate.

he entered into the processing contracts, the carrying out of which makes the processors liable for the payment to third-parties of the reasonable value of their interests in helium, including all rights necessary or incidental to its normal delivery and delivery for ultimate beneficial use.

The legislative history of the Act includes officials reports leading up to the Act which reveal that the true value of helium was not known. The testimony of the Interior Department discloses that there was then no such thing as a true competitive market for helium. It is and was undisputed that a government helium monopoly existed in 1960 and before. The Department of the Interior told Congress that helium was then worth about a hundred times as much as natural gas (15 cents v. $15.00); that the proposed conservation program would essentially recognize and fill a market for helium for the future indispensable needs of the people; and that a man should not have his helium taken away from him without receiving full and fair value for it.

Congress was, at the same time, told by the Department of the Interior that the helium would be paid for by the users of helium—the ultimate consumers of helium, with the government participating in a proprietary capacity in a contemplated industrial or commercial enterprise. See Sec. 15 of the Act. (App. p. A552)

Nevertheless, the Department of the Interior strenuously objected throughout the Congressional hearings to the fair value concept (measured by *terms, and prices determined* to be *commensurate* with the fair market value, which was eventually included as Section 3 of the Act (App. pp. A542-543)) over the objections of the Department.

In testifying before the House Subcommittee on Mines and Mining of the Committee on Interior and Insular Affairs, Under Secretary of the Interior Bennett stated in answer to a question by Congressman Aspinall:

> ". . . This program essentially establishes a market for helium which does not exist today . . . . What we are doing is actually providing a market against the future need for helium. If we dealt with our current, ordinary, everyday requirements for the use of helium . . . we would have no market. What we are doing is *providing a market today* against the needs of the people 25 years from now for helium." (Appendix Ex. Vol. IV, p. 785)

In answer to Congressman Rogers, Mr. Bennett stated:

> "[Mr. Rogers] You would not think a man's property, though, Mr. Bennett, should be taken away from him without him receiving *full and fair value* for it, would you?
>
> "[Mr. Bennett] I think that is correct. The difficulty with the concept, as I mentioned before, as in H.R. 10458, *is use of the word 'market,' where in fact, there is no market.*" (Appendix Ex. Vol. IV, p. 825)

As indicated by Mr. Bennett's testimony, the Department of the Interior objected to the fair market value concept finally included in the Act on the theory that since there was no present market value for helium in fuel streams, no value should be paid because of the demand for future use requiring conservation. The objections of the Department of the Interior to the fair value concept in the absence of any present market for helium in fuel streams, were strenuous and emphatically repeated throughout the hearings, both in the House and later in

the Senate. Congress, nevertheless, included the fair value concept in the Act.

In so doing, it is apparent that the view of Congressman Rogers, from the gas producing areas of Oklahoma, prevailed in Congress, rather than the views of the executive branch. It was Congressman Rogers' Bill (H.R. 10548), referred to by Mr. Bennett in the above-quoted testimony, which introduced the fair value concept in view of the government monopoly and the absence of an existing market for helium in fuel streams. As stated by him about this helium for which there was no present market, but which was to be conserved to apply to the demand for beneficial use in the future under the Helium Act:

> "[Mr. Rogers] You have got, as you well know, *thousands of royalty owners,* who are entitled to have the fair value of the property and that is what it is, it is property, in which they own an interest or in which they own the whole property, in some instances. I think that those people ought to be taken into consideration, too."

Mr. Bennett was reluctantly forced to agree, recognizing at that point that the value to be paid royalty owners would result in additional costs to the Helex Group. His answer was:

> "[Mr. Bennett] I think *they would have to be* because that, of course, would be a cost of doing business, from the point of view of the contractor with whom we dealt." (Appendix Ex. Vol. IV, p. 827)

But the objections of the Department of the Interior, nevertheless, continued before the House Committee and were later urged in the Senate hearings in spite of Mr. Bennett's concession.

The continued opposition of the executive department to the fair value concept is understandable. Without such explicit provisions, the contemplated legislation would not have pinpointed, but would, rather, have left obscure the necessity of paying for third-party interests if landowners were not present during contract negotiations. It had been proposed that helium be acquired under the Act through negotiations merely on terms deemed "reasonable" to the Secretary of the Interior, without any reference to the value of helium. Bills to that effect were supported by the Department of the Interior, as well as pipeline groups. But Congress, in spite of those efforts, substituted the fair value concept in the proposed legislation, with fair value to be the rule not only in condemnation, *but in connection with contracting authority.* This made it clearly necessary for the Secretary of the Interior specifically to provide, in the conservation contracts, for payment of fair value for third-party interests.

Congress so acted after being repeatedly warned that there was no presently established market value for the helium wasted in fuel streams and that the requirements for helium for conservation and separate beneficial use would be reflected in the processing costs, to be passed on to the ultimate users of the helium.

Congress was under no illusions regarding cost and pricing problems, as shown by the above. Neither was it under any illusions regarding how the helium would be paid for. It was to be paid for by users of helium—the ultimate consumers of helium. The Government's unusual role would be that of a participant, in a partnership with business, in an industrial or commercial enterprise. This is further shown by the following exchange between Congressman Kyl and Mr. Bennett:

"[Mr. Kyl] . . . You state that the preliminary calculations indicate a price of $40 or double the present price. Recognizing there is that increase in price likely, what is your opinion as to the immediate effect of this program on the price? As soon as you have implemented this program, what is apt to result in the pricing field?

"[Mr. Bennett] That is a little difficult to pinpoint, but I think we have said from the beginning that as we put these new plants on the line to make possible the extraction of this helium to be stored against future use, it would be our expectation that, at that time, the current *users* of helium should share the cost of making helium available to those *users* at the end of the period and that we would expect the price increase to go into effect by the time we really got well underway with the program."

The possibility of condemnation by the Government and its monopoly permeated pre-amendment transactions. The possibility of condemnation continued to hover over the negotiations under the conservation contracts. Congress recognized that values cannot be established by reference to transactions consummated under threat of eminent domain and in a monopoly market.

A Helex attorney, Mr. Lyle, a former Congressman, testified before the Congressional Committee. He served as chairman of a group of lawyers who had studied the proposed legislation and the problems arising therefrom. He pointed out the "government monopoly" and the lack of a "complete free and competitive market." He suggested the necessary use of a value-less-expense approach because of the absence of sales conducted in a free and competitive market. He testified:

"In the existing situation helium has no market price except the arbitrary price set by the government under its policy of monopoly. Where free markets and competition are absent, it is necessary to consider all elements—*the intrinsic value of helium, the value of helium if extracted by industry and sold on a competitive market, the volume of gas processed, the percentage of helium to the volume of gas processed, the plant investment, the cost of helium production in Government plants, taxes, cost of money, plant operations, profits in unregulated industry, etc.*, all of these are elements that will be considered in arriving at 'terms and at a price commensurate with a fair market price.'"

The Secretary of Interior was authorized, under Section 3(a) of the Act (App. pp. A541-543) to acquire all necessary and incidental rights to obtain the helium for beneficial use (1) through condemnation, (2) through agreement, or (3) by a combination of condemnation and agreement. As a prerequisite to condemnation, however, it was necessary for the Secretary to make two determinations. The first necessary determination was that the national interests required the conservation of certain helium, helium-bearing natural gas, or certain helium-gas mixture. Sec. 3(a)(2)(A) of the Act (App. p. A542) That determination was actually made by him and is recited as a "Whereas" in each of the four agreements. (For example, see App. p. A614)

The second necessary determination was that the Secretary was unable to acquire the rights upon reasonable terms and at the fair market value in the absence of condemnation. Sec. 3(a)(2)(B) of the Act (App. p. A542) The Secretary did not make this determination because he was able eventually to satisfy the Congressional guidelines through most unusual contractual provisions for

the benefit of third-parties, making condemnation unnecessary.

A remarkably interesting aspect of this case is an understanding of just how the Secretary actually succeeded in contracting within the limitations of the Congressional guidelines for the benefit of third-parties. He had some formidable obstacles to overcome, sufficient to challenge the ingenuity of the best lawyers.

In attempting to meet these Congressional guidelines, the Secretary was confronted with two critical matters which had to be dealt with if the contractual method was to be used within the short time available to put the conservation program into effect.

No one then could identify all of the third-parties owning all interests necessary or incidental to recovery of the helium for ultimate beneficial use. How could the Secretary proceed through the contract route without contracting with parties not present and at the same time comply with Congressional directives?

There was a related question: What contractual provisions could be devised in order to assure that proper payment to third-parties would, in fact, be made in the absence of condemnation?

The Secretary devised a sensible, although ingenious, solution to both problems within the specified Congressional guidelines. The Secretary entered into contracts with four companies (or their affiliates) owning large pipelines into which were gathered large quantities of natural gas. It had become known that the pipelines were in accidental possession of helium carried along by the gathered natural gas produced by them or sold to them, which helium had been unwittingly severed from the ground through production from wells located on respon-

dents land in the course of intended oil or gas leasehold operations and that, at a specified point on each pipeline, sufficient helium, so incidentally gathered, was present to make its removal economically feasible for delivery to the government's conservation pipeline.

If reasonable, certain and adequate arrangements could be made in the contracts themselves providing for payments to third-parties owning interests necessary or incidental to such helium recovery for beneficial use, no problems regarding the right to immediate possession would be present. But problems would remain as to the entire bundle of interests constituting unencumbered title. The Secretary solved the problem by including in the contracts themselves arrangements for the eventual purchase and sale of all interests incidental or necessary to the removal of helium delivered into the government pipeline, whether or not owned by the contracting processing company at the time of contracting or delivery, and sensibly included provisions which would make it possible eventually for the processing companies themselves to acquire the unencumbered right to the same by payment to the third-party owners thereof of the required values, and for the processing companies only thereafter to warrant the full unencumbered "title" to the government, upon the government's payment of escalated compensation to the Helex Companies to compensate them, in part, on a per Mcf basis, for their cost of acquiring such outstanding third-party interests.

The contract with National Helex Corporation is typical. It is called a "Contract for the Sale and Purchase of a Helium-Gas Mixture." (App. p. 613) It is still an executory sales contract. Until the required payment by National to third-party owners of all rights necessary or incident to the acquisition of the helium for beneficial use is made National is not in a position to deliver the unen-

cumbered necessary bundle of rights. Nor is National entitled to full payment under the processing agreement until all such interests are required by it for conveyance under the contract. The price provisions still remain executory as to all helium delivered. The price provisions of the contract which make this clear are contained in "ARTICLE VII, PRICE." (App. pp. A623-627)

Paragraph 7.1 of that Article (App. p. A623) provides that the prices paid to the processing company are to be determined by reference to the volumes of helium contained in the inert helium-gas mixture delivered to the United States.

Paragraph 7.2 of the contract (App. p. A623) provides for an initial unit price of $11.78 per Mcf.

Paragraph 7.3 (App. pp. 623-624) provides for certain adjustments in such initial unit price, which initial unit price for purposes of such adjustments, is divided into two parts. Part one, 91 cents, is subject to upward or downward adjustment based upon changes in the purchase price of natural gas paid for by National's affiliate, Panhandle's Eastern Pipeline Company. Part two, the major portion of the initial unit price, is $10.87 and is subject to a "cost of living" adjustment based upon changes in a Bureau of Labor Statistics wholesale price index for all commodities exclusive of farm products and food.

Paragraph 7.4 is an escalation of the initial unit price based upon natural gas regulatory action affecting joint costs and new taxes.

Paragraph 7.5[2] of "ARTICLE VII, PRICE" is an escalation provision providing for a further adjustment in the price. It provides as follows:

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2. This provision is paragraph 7.4 of the Northern Helex and Cities Helex agreements.

"7.5 In addition to all other amounts payable under this contract, Buyer shall pay to Seller all amounts, except as hereinafter provided, that Seller shall pay subsequent to the date of this contract, directly or through an affiliated company to parties other than itself or an affiliated company for the acquisition of helium in the natural gas, as defined herein, or for any interest in such helium. Any such payment to qualify for inclusion hereunder shall be made only with the consent of Buyer; and for the purposes of this paragraph 7.5 Buyer shall be deemed to have consented to any and all such payments in satisfaction or settlement of any claims to helium in the natural gas, as defined herein, or to any interest in such helium that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state. Further, Buyer shall be deemed to have consented to any and all such payments under circumstances similar to any such judicially determined claim if such payments are made generally in accordance with the findings, principles, and conclusions of any such judicial determination. The amounts that Buyer shall be required to pay to Seller in accordance with this paragraph shall not include an amount to be calculated applicable to such acquisition equal to twenty-seven and one-half percent (27.5%) of the weighted average of part two of the unit price or unit prices in effect during the time covered by such acquisition multiplied by the volume in Mcf of helium in the natural gas, as defined herein, covered by such acquisition."

The provision contained in the last sentence of Paragraph 7.5 above quoted, requires, in effect, that National will absorb, out of the package of monetary and other benefits received by it or its affiliates by reason of the con-

tract, the first approximately $3.00 per Mcf of payments to third-party claimants. The total purchase price can be determined only when the amount of required third-party payments are made and paid. Until then, the price provision of the contract remains and will remain indeterminate as to all helium heretofore delivered.

The nature of the contract is such that it requires that the value of the third-party helium interest be separately and independently arrived at in judicial proceedings in the absence of full agreement. Only then can the escalated amount be computed to arrive at the final price to be paid by the government under the processing agreement.

When the sensible arrangements provided by the contract are finally performed, the processing companies and their affiliates will have acquired all rights necessary or incident to the acquisition by the government of the helium, with all related statutory requirements fully satisfied.

The 7.5 provision made it possible to establish an ultimate price to be paid to National in order that the contract could be fully carried out and performed as a "sale and purchase agreement," covering all interests, including interests of third-parties.

The arrangement for payment by the processing companies to third-parties of the value only after judicial determination is significant. Only through such payment will the eventual acquisition by the government of the entire bundle of necessary rights be made possible in the absence of condemnation.

Because of the arrangement, these court proceedings are not eminent domain proceedings, but they do substantially meet Congressional intent. Any other construc-

tion of the Secretary's actions and the contract would be in violation of Section 3 of the Act.

Through the operations of the contract and through court proceedings, the intent that all parties interested be paid by agreement or by *terms* and prices judicially determined to be *commensurate* with fair market value will be achieved.

Pursuant to the contract, each of the processors and the government have agreed on an arrangement, as between themselves, which is satisfactory to both of them under all circumstances.

Neither knew who owned all rights necessary or incident to the acquisition of the helium for beneficial use or the extent of the value to be paid therefore. Both of them recognized that, short of court proceedings or further agreement with third-parties, neither of such issues could be determined. The parties were not in a position to bargain for others as to the extent of their interests or as to such value. But they could make a package arrangement to settle all such issues as between themselves. The relative economic consequences in any event, as between themselves, were all agreed upon and included as part of the package.

As indicated above, the Mcf purchase price under the contracts cannot be ascertained until the value of such third-party interests are determined. The typical 7.5 escalation provision of Article VII (Price) in the National contract with the Secretary was necessary in order to establish the ultimate compensation to be paid to the processor in order that the contract could be fully carried out and eventually performed as a contract providing for the sale and purchase of a helium-gas mixture covering all interests in the helium contained in the delivered mixture, specifically including third-party interests.

In addition, the helex processing company agreed to indemnify and hold the government harmless against "any and all claims of third-parties." This was typically arranged in Section 8.2 of Article VIII (Ownership and Title) of the National contract (App. pp. A627). But the processors' indemnification and hold harmless agreement will not become fully effective until the owners of the third-party interests are fully compensated after judicial determination of their interests and of the amounts to be paid to them in these cases, because this provision related the effective date of the processor's indemnification and hold-harmless agreement to the time of payment by the government to the processor of the escalated amounts required by Sec. 7.5.[3]

The provision in Section 7.5 requires, however, that the government's obligation to make the escalated payments become effective only after the processing company has made such payment ("all amounts . . . that *Seller* shall pay" App. p. A626) to the third-party interests. The Secretary thus assured himself that the upward adjustment in the purchase price—the escalation in the compensation to be paid by the government—would be triggered only upon the processor having already acquired, through payment therefor, the necessary third-party interests for unencumbered delivery to the government through the contract.

In this way, the Secretary was able to arrange for one payment on a per Mcf basis directly to the processor for its services and also for all rights necessary or in-

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3. The section 8.2 language in the Northern (App. p. A654) agreement is in terms of warranty instead of indemnification and hold-harmless, and the reference to the effective date thereof in the Northern, and also in the Cities contract (App. pp. A657-658), is to paragraph 7.4, substantially identical to paragraph 7.5 of the National agreement.

cidental to the acquisition of helium for ultimate beneficial use, including the helium rights to be acquired by the processor from others, in accordance with Congressional guidelines and through contemplated judicial determinations in the absence of third-party agreement.

All economic benefits to the processors are attributable to the contractual arrangement—a particularly practical procedure. That procedure required further dealing with someone other than the contracting parties. The bargained-for consideration to be received by the processor for its services includes a negotiated evaluation and sharing of risks as to both acquisition problems and helium value.

The package typically includes provisions, other than the typical Paragraph 7.5 and 8.2 provisions which recognize third-party claims, such as the termination provisions (see paragraph 12.2(2), App. p. A636) and the typical contingency provision (see paragraph 13.4, App. p. A641) referring to continued operation of the facilities, if purchased by the government after termination, and to a resulting required negotiation for rights in helium needed by the government which National "might own."

It is apparent from the above that, since the contract was designed to provide for the acquisition of all interests, whether then owned by processor or not, the processor was obviously not in a position, at the time of contracting, to warrant title to the entire bundle of rights necessary or incidental to the acquisition of the conservation helium to be delivered to the government. Bu[illegible] would be able to do so after third-party claims consti[illegible]uting encumbrances were determined and paid for. To meet this problem, the parties arranged that the processor's indemnification and hold-harmless or title warranty agreements would not be fully effective until all such necessary rights

and interests had been identified, determined and paid for and that, when such determination and payment was made, and only then, would the processor's indemnification or warranty of title be in full force and effect.

Paragraph 12.2(2) (App. pp. A636-637) of the National agreement typically provides that the processor may terminate the agreement if a third-party claim adverse to its interest is validated by court order, but only if the processor is unable to obtain such third-party interest with the consent of the government to make the escalated payment to it under the typical Paragraph 7.5 of the National Agreement.

As indicated above, the full impact of the third-party beneficiary aspect of the contract is driven home upon examination of Paragraph 8.2 of Article VIII "Ownership and Title" of the typical National Agreement. (App. p. A627)

Under this provision, the Helex company agrees to indemnify and save the government harmless from "any and all claims of third-parties." As above also indicated, such indemnification and hold-harmless agreement or title warranty is subject, however, to the agreement of the government to make certain payments to the Helex company under Paragraph 7.5, with the Helex company agreeing to document its rights, titles and interest. This peculiar contractual provision thus relates the effective date of the processor's indemnification or warranty to the time of payment for third-party interests.

The obligation of the government "to make certain payments" arises only after required payments to third-parties have already been made by the processors for the acquisition of the necessary third-party interests. The Secretary was thus assured that the upward adjustment

of the purchase price to be paid by the government by reason of the acquisition of third-party interests was to be triggered only upon acquisition by the processor, through payment therefor, of necessary outstanding interests.

Under Paragraph 8.2, the processor now also became assured that its warranty of title would not attach until the government had paid to the processor the escalated purchase price.

Through the efforts of the Secretary, the substantial equivalent of Congressional intent will be achieved, with landowners, lessee-producers, the processing companies and their affiliates all being included as a part of the "individual enterprise" which Congress stated it was in the national interest to foster. (See Sec. 15 of the Act, App. p. A552)

As a result, conservation of helium has now been achieved. But the payment necessary for the acquisition of the entire bundle of rights constituting unencumbered title has not yet been achieved and the entire price to be paid to the processors has not yet been determined, since it will include payment for that part of the bundle attributable to third-party interests.

It is fully apparent that the wellhead value of helium cannot be determined by reference to the base prices set forth in the processing agreements and already paid to the processor, since a separate and independent determination of the value of third-party interests is provided for, which, when determined, will become, to an agreed-upon extent, a part of the entire amount of "money paid and to be paid by the United States to the interpleading plaintiffs", constituting the interpleaded fund. (App. p. A137)

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Nos. 81-1920, 81-1921, 81-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION , *et al.*,
Respondents.

NORTHERN NATURAL GAS COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORP, *et al.*,
Respondents.

CITIES SERVICE GAS CO., *et al.*,
Petitioners,

v.

MOBIL OIL CORP., et al,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT GULF OIL CORPORATION, A LESSEE-PRODUCER

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May 1982

QUESTIONS PRESENTED

1. Whether this Court should grant petitions which seek review and reversal of judgments upholding respondents' quasi-contractual right to recover the reasonable value of commingled helium out of interpleaded funds, in view of its five denials of like petitions in this and a related action.

2. Whether the Court of Appeals denied petitioners due process of law in holding, under the doctrine of the law of the case rather than stare decisis, that the workback method of valuing commingled helium is applicable in these actions.

3. Whether the Court of Appeals denied petitioners due process of law in holding that payments to petitioners by the United States for commingled helium as a part of the prices paid for crude helium, were money had and received to respondents' use and were the minimum of respondents' recovery in these actions.

4. Whether the Court of Appeals denied petitioners due process of law in holding these cases under advisement, after consolidated *en banc* argument with a related case, until the issue of the value of commingled helium was finally determined in the related case, and then removing these cases from *en banc* status and setting them for further briefing and oral argument before a panel of the Court.

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT GULF OIL CORPORATION, A LESSEE-PRODUCER

STATEMENT

Nature of the Actions

These are six consolidated class actions in the nature of interpleader brought under 28 U.S.C. § 1335 in the District Court for the District of Kansas by petitioners (the Helex Group) against two groups of defendants, one the respondent lessee-producers, the other the respondent landowners, to determine adverse claims to interpleaded funds, which are the proceeds received by petitioners from the sale of 23.4 million Mcf of crude helium to the United States during the Helium Conservation Program, which was in effect from 1962-1973, pursuant to the Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. § 167 et seq. The United States intervened and aligned itself with petitioners.

It has previously been decided in these actions that respondent lessee-producers are entitled to recover the reasonable well head value of commingled helium out of the interpleaded funds. *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). (J.A. A134) The judgment of which review is now sought relates only to the method of determining value, the minimum of such value and the allowance of pre-judgment interest.

The Five Prior Petitions

The petitions now before this Court are the sixth, seventh and eighth which have been filed by petitioners or their allies, Phillips Petroleum Company and the United States seeking review and reversal of judgments holding that respondents are entitled to recover the reasonable value of commingled helium in quasi-contract and deciding the method of determining rea-

sonable value. The five prior petitions have been denied in three cases which have come to be known for convenient reference as *Grounds I*, *Ashland I* and *Ashland II*, with these cases being known as *Grounds II*. These cases may be summarized as follows.

Grounds I

The first case, in which this Court denied the first two petitions, which were by the present petitioners, was *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). (J.A. A134) In it the Court held that "the Helex companies must account to the lessee-producers for the reasonable value of the helium contained in the processed gas and the lessee-producers must pay royalty on such value to the landowners". *Id* at 707. (J.A. A137). This is required by "reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole". *Id.* at 723. (J.A. A168). In so holding the Court rejected the claim of petitioners to the entirety of the interpleaded funds which was based on the argument that "there is a contract sale of commingled helium when it is sold as a component of the gas stream under FPC service rates". *Id.* at 721. (J.A. A164). But the Court rejected this argument, saying "We are not persuaded. The protection of the Natural Gas Act is for consumers, not the Helex companies". *Id.* Later it said "In our opinion private contract law and the principles applicable thereto are not controlling". *Id.* at 722. (J.A. A166).

This decision ended the liability phase of these cases which had been divided from the beginning into a liability phase to be tried first and a damage phase to be tried later, if necessary. The Court of Appeals

accordingly remanded the cases to the District Court for trial of the damage phase, which is these *Grounds II* cases.

Ashland I

The second case, in which this Court denied the third and fourth petitions, one by the United States, the other by Phillips, was *Ashland Oil, Inc. v. Phillips Petroleum Co. v. United States*, 554 F.2d 381 (10th Cir. 1977), *cert. denied*, 434 U.S. 921, 968 (1977). (J.A. A429). This was a diversity action in the District Court for the Northern District of Oklahoma by Ashland against Phillips, in which the United States intervened and aligned itself with Phillips, to recover the value of commingled helium which Phillips had separated from gas supplied by Ashland and sold to the United States as crude helium under circumstances identical with these cases.

This action was pending when the decision on liability in *Grounds I* became final. When this occurred, Ashland's action went to trial before these *Grounds II* cases. The Oklahoma District Court held that commingled helium had a well head value which ranged from $11.76 to $16.98 per Mcf. *Ashland I*, 364 F. Supp. 6 at 10. (J.A. A477). Phillips and the United States appealed.

While these appeals were pending, the Kansas District Court proceeded to the trial of these *Grounds II* cases. He held that commingled helium had a well head value which escalated from 60¢ per Mcf in 1961 to 70¢ per Mcf in 1972. Grounds II, 393 F. Supp. 949 at 984. (J.A. A105). The lessee-producers and the landowners appealed.

Faced with this vast gulf in valuations by the two district courts, the Court of Appeals withdrew a prior

opinion in *Ashland I*, granted rehearing *en banc*, granted hearing *en banc* of these *Grounds II* cases, and consolidated the two cases for argument and submission.

Following the consolidated *en banc* hearing, the Court of Appeals held these *Grounds II* cases under advisement, and handed down its opinion in *Ashland I*. It made three important basic holdings:

It held that Ashland was entitled to recover the reasonable value of commingled helium in quasi-contract and that such recovery was not barred by the price provisions of the gas purchase contracts which had been filed as FPC gas rate schedules. *Ashland I*, 554 F.2d 381 at 388. (J.A. A445).

It held that federal, and not state, law was to be applied not only in construing the federal statutes involved but also to all substantive issues, under the doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), because of the deep involvement of the United States in the Helium Conservation Program and this litigation. *Id.* at 389-391. (J.A. A448-A453).

It held that the District Court was correct in holding that there were no comparable sales by which the value of commingled helium could be determined and that work-back (value or proceeds-less-costs) was therefore properly applied, *Id.* at 386-388. (J.A. A440-A445); but it reversed and remanded for additional evidence on the proper starting point and four cost items. *Id.* at 388-389. (J.A. A445-A448).

Ashland II

The third case, in which this Court denied the fifth petition, which was by Phillips, was *Ashland Oil, Inc. v.*

Phillips Petroleum Co. and United States, 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980). (J.A. A385). This was a *per curiam* opinion in which the Court of Appeals affirmed a valuation of $3 per Mcf but remanded for the inclusion of pre-judgment interest.

The District Court arrived at the $3 value not only upon an application of work-back but also upon a consideration of the equitable nature of Ashland's quasi-contractual action and the inclusion of the $2 payment for commingled helium in the prices which the United States paid Phillips for crude helium. *Ashland II*, 463 F. Supp. 619 at 625. (J.A. A390 at A426-7).

Phillips' petition did not question the method of determining value but again urged, as had its petition in *Ashland I*, that the price provisions of the FPC gas rate schedules defeated recovery of reasonable value in quasi-contract. Phillips' Pet. for Cert. in No. 79-1250, October Term, 1979.

Grounds II

When *Ashland II* became final upon this Court's denial of certiorari, the Court of Appeals *en banc* upon its own motion ordered that these *Grounds II* cases be removed from abated status, that their *en banc* status be terminated and granted leave for further briefing and a second oral argument before a three judge panel. (J.A. A330). Following this second oral argument, it handed down its decision which the Helex companies now petition this Court to review and reverse. *Northern Natural Gas Co. v. Grounds*, 666 F.2d 1279 (10th Cir. 1981). (J.A. A1).

It held that work-back is as applicable here as in *Ashland I* and *II* because the record here does not show any comparable sales which were not already found

non-comparable in *Ashland I* and because the opinion of an expert witness upon which the District Court and petitioners relied was not a sufficient basis for rejecting work-back. It therefore held that the District Court erred in rejecting it. *Id.* at 1283-1285. (J.A. A10-A15).

It held that a $2 per Mcf payment for commingled helium which petitioners had received from the United States was money had and received to respondents use and was the minimum respondents were entitled to recover out of the interpleaded funds. *Id.* at 1285-1289. (J.A. A15-A24). This payment had been included in the build-up of the prices paid petitioners for crude helium, which was based on the costs the government would have incurred had it built the plants plus interest on investment, taxes, insurance and profit. One of the cost items was called "helium payment" which was a payment of $2 per Mcf of commingled helium delivered at the plant inlet. It increased to $2.35 per Mcf when related to the volume of the crude helium delivered at the plant outlets for which the government was paying. It was as applicable at the well head as the plant inlet, because all costs between these two points were covered by another item called "shrinkage". *Id.*

Finally, it held that the District Court did not err in awarding pre-judgment interest. *Id.* at 1289-1290. (J.A. A24-A26).

It remanded the case for further proceedings in the light of the opinion.

SUMMARY OF ARGUMENT

The Court of Appeals did not deny petitioners due process of law in holding for the fourth time that respondents are entitled to recover the reasonable value of commingled helium. All of petitioners arguments to defeat such recovery are based on the controlling effect of state law and the price provisions of the FPC gas rate schedules. These arguments were rejected in *Grounds I*, *Ashland I* and *Ashland II*, which held that the right of recovery is quasi-contractual, is controlled by federal law and is not barred by either payment of FPC service rates or the price provisions of FPC gas rate schedules. This Court has denied five petitions which sought review and reversal of these decisions.

The Court of Appeals did not deny petitioners due process when it held upon appeal, and without the question having been raised in the District Court, that the $2 "helium payment" was money had and received by petitioners to the use of respondents. This is a pure question of law based on the undisputed fact that this payment was for commingled helium and was received by the petitioners as a part of the prices paid by the United States for crude helium. No amount of evidence could erase this fact, and petitioners' argument that this holding is contrary to state contract law again ignores that these are quasi-contractual actions governed by federal law — and that under federal law restitution must be made of benefits received in excess of lawful service rates.

The Court of Appeals did not deny petitioners due process in holding, as a matter of the law of the case rather than stare decisis, that work-back is as applicable here as in *Ashland* in determining the value of commingled helium, since it had heard petitioners'

arguments to the contrary at both the first and supplemental arguments of these cases.

Since an *en banc* hearing is not a matter of private right, but of sound judicial administration, the Court of Appeals did not deny petitioners due process of law when it returned these cases to three-judge status for a second hearing after the *en banc* court had decided the proper method of valuing commingled helium in *Ashland I.*

ARGUMENT

Right of Recovery and Due Process

The preceding review of the course of these proceedings shows that this Court has denied five petitions seeking reversal of decisions that respondents are entitled to recover the reasonable well head value of commingled helium in quasi-contract. Nevertheless, the present petitions again seek such reversal and urge that recovery is limited by the price provisions of the gas purchase contracts filed as FPC gas rate schedules.

The reasons now advanced in these sixth, seventh and eighth petitions are a revised edition of the reasons which petitioners originally advanced in *Grounds I.* They are identical with the reasons which the United States and Phillips advanced in *Ashland I* and *II.*

Petitioners originally argued in *Grounds I* that there could be no recovery of reasonable value in quasi-contract because "there is a contract sale of commingled helium when it is sold as a component of the gas stream under FPC service rates". *Grounds I,* 441 F.2d 404 at 721. (J.A. A164).

When the Court rejected this argument and held that FPC service rates do not cover commingled helium,

petitioners, Phillips and the United States changed the focus of their argument from payment of FPC service rates to the price provisions of the gas purchase contracts filed as FPC gas rate schedules. This shift was inspired by this Court's holding in *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974) that there was not federal district court federal question jurisdiction under 28 U.S.C. § 1331(a) of Texaco's suit against Phillips to recover the reasonable value of commingled helium. From this Court's statement that the "source [of the action] is state law and not federal law," *Id.* at 129, it was argued in briefs and at the consolidated *en banc* hearing of these cases and *Ashland I* that state substantive law applies under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and that there can be no recovery in quasi-contract because of the universal rule of state law that an express contract precludes an implied contract.

The Court of Appeals rejected this argument in *Ashland I.* It pointed out that *Texaco* "was concerned only with federal question jurisdiction under 28 U.S.C. § 1331(a), and not whether state or federal law controls", and that "federal law was applied" in *Grounds I. Ashland I*, 554 F.2d 381 at 389. (J.A. A449). It then held that federal law under *Clearfield*, and not local law under *Erie*, controlled all substantive issues, because of the deep interest and involvement of the United States in the Helium Conservation Program and this ensuing litigation. *Id.* at 389-391. (J.A. A449-A453).

Concerning Phillips' claim that the price provisions of the FPC gas rate schedules barred recovery in quasi-contract it said,

> Phillips argues that its right to acquire the helium component was covered by its contracts, and neither the Helium Act nor the Natural Gas Act altered these contracts. Thus there was a Fifth Amendment violation if its property was "given" to another. This court on the *Grounds* case really decided this issue and there would seem to be no need to consider it again other than to state that Phillips acquired the whole stream or production, but has only paid for part. We said in *Grounds*, "In our opinion private contract law and the principles applicable thereto are not controlling."

Id. at 388. (J.A. A445).

It is thus the established law of these cases that neither local law, the payment of FPC service rates nor the price provisions of FPC gas rate schedules bar or limit respondents' recovery of the reasonable value of commingled helium in quasi-contract. Petitioners' arguments that they are thereby deprived of contractual property rights without due process of law have previously been rejected and have no merit.

The $2 Helium Payment and Due Process

The arguments that petitioners direct against the holding that the $2 helium payment is money had and received to respondents' use are that this issue was first raised on appeal and that the holding is contrary to state rules of contract law. These arguments again ignore that these are quasi-contract actions which are controlled by federal law — one rule of which is that restitution must be made of benefits received in excess of lawful service rates and that an appropriate action to

this end is the modern successor of the common law action of *indebitatus assumpsit* for money had and received. This is the holding of the two decisions of this Court upon which the Court of Appeals based its decision. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301 (1935).

The application of this rule in these cases is invoked by the undisputed facts concerning the build-up of the prices which the United States paid petitioners for crude helium, which the Court below reviews in its opinion. *Grounds II*, 666 F.2d 1279 at 1286-88. (J.A. A15-A24). In very brief summary these facts are that one of the cost items in the build-up was a "helium payment" of $2 per Mcf of helium contained in the gas delivered at the plant inlet, because this is what the United States would have paid had it built the plant. This was increased to $2.35 per Mcf when related to the volumes of crude helium at the plant outlets for which the United States was paying. And it was applicable at the well head because another item called "shrinkage" covered all costs between the well head and the plant inlet.

The holding that this payment was money had and received to the use of respondents can have come as no surprise to petitioners. Its importance was first noted in *Grounds I* when the Court of Appeals said at the very beginning of its consideration of the question of respondents' right of recovery that this "recognition of helium value in the volumes of gas processed in the plants results in a price substantially higher than the FPC service rate". *Grounds I*, 441 F.2d 704 at 717. (J.A. A157). It was twice noted by the District Court in *Ashland II* as one of the factors considered in determining commingled helium value. *Ashland II*, 463 F. Supp. 619

at 626,635. (J.A. A407, A426). And in their supplemental brief in these *Grounds II* cases petitioners discuss its legal effect, but their discussion is dismissed with the comment "These statements, in our view, do not address the issue". *Grounds II*, 666 F.2d 1279 at 1288. (J.A. A22).

Despite this rejection of the arguments they have already made on this issue, petitioners now assert a denial of due process because the issue was not raised in the trial court. There might be a semblance of merit in this contention if, as petitioners assert, these were contract actions governed by state law. But they are quasi-contract actions governed by federal law. And no amount of evidence that the Helex companies might produce could erase the fact that the payment was for commingled helium and that it was received by petitioners as a part of the price for crude helium. On this fact alone depends petitioners' obligation to make restitution of this benefit received in violation of the federal law of rate regulation which the Court applied in *Grounds I*.

Work-back and Due Process

When this Court's denial of certiorari in *Ashland II* placed the stamp of unreviewable finality on the holding that work-back was the proper method of determining commingled helium value in that case, the Court of Appeals on its own motion set these *Grounds II* cases for further briefing and a second oral argument.

At that hearing petitioners and the United States had the opportunity to show that work-back was not applicable here, even though it was in *Ashland*. That they took advantage of this opportunity is shown by the opinion below. It summarizes and finds insufficient the testi-

mony of the expert which was their principal reliance for distinguishing these cases from *Ashland. Grounds II*, 666 F.2d 1279 at 1284. (J.A. A12). It also reviews and finds insufficient to the same end two sales of commingled helium and 41 interstate sales and 25 intrastate sales of helium-bearing natural gas which petitioners proffered as "a wealth of comparable sales in addition to those before this court in *Ashland*." *Id.* at 1284-5. (J.A. A12-A14). The Court of Appeals therefore held that these cases are not distinguishable from *Ashland* and that work-back is as applicable here as it was there.

Whether this holding is based on the doctrine of the law of the case or *stare decisis* does not raise a question of constitutional magnitude. Even though petitioners were not parties to *Ashland*, they have been accorded two hearings of their arguments concerning the proper method of valuation, one before and one after the decisions in *Ashland*. At the second hearing, their arguments were directed expressly to the point that *Ashland* was distinguishable and was not a controlling precedent. The arguments were found wanting. Due process does not entitle them to still a third hearing on this question.

En Banc Hearing and Due Process

Nor did the Court of Appeals, as is urged by Northern and Cities Service, but not by Panhandle, deprive petitioners of due process rights when it removed these cases from *en banc* status before the second argument and assigned the second argument to a three-judge panel. An *en banc* hearing, and even more a second *en banc* hearing, is not a matter of private right but of sound judicial administration. Petitioners have made, and can make, no suggestion that it is not sound judicial

administration to return a case to three-judge status for decision of any remaining issues, after the *en banc* court has decided the basic issue of the proper method of valuation and thus bridged the vast gap in valuations between the two District Courts, which led to convening the *en banc* court in the first place.

Moreover, petitioners have, in effect and for practical purposes, already enjoyed a second *en banc* hearing. They filed their petitions for rehearing and suggestions for rehearing *en banc* as single documents. The Court ordered responses by these respondents, which was done. All of the active judges of the Circuit and of the three-judge panel were thereby obligated to examine and consider not only the suggestions but also the petitions and responses. Having done so, no single judge asked for a vote on the suggestions.

CONCLUSION

The cumulative result of petitioners' arguments is that their due process rights will not have been satisfied unless they are granted plenary review by this Court or a fourth hearing by the Court of Appeals, which must be *en banc,* at which it must overrule four decisions holding that respondent lessee-producers are entitled to recover the reasonable value of commingled helium in quasi-contract.

Their arguments are frivolous.

Their petitions should be denied.

Respectfully submitted,

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May 1982

APPENDIX

List of affiliates and subsidiaries of Gulf Oil Corporation which are not wholly owned:

A/S Jargul

A/S Jargul and Co. K/S

AB Djurgardsberg

Adela Investment Company, S.A.

Albert Rose Chemicals, Ltd.

Allied — General Nuclear Services

Andogas S.A. (Switzerland)

Asia Polymer Corp.

Autobahn — Raststaette Wuerenlos Ag

Aviation Fueling Services — GT&T International Aviation Sales

Bryce & Co. Pty. Ltd.

China Gulf Oil Company Limited

China Gulf Plastics Corporation

Chinhae Chemical Company, Ltd.

Colonial Pipeline Company

Compagnie D'Investissement Bustibles De Reacteurs A Haute Tp

"Condor" Industria Quimica, S.A.

Delaware Bay Transportation Company

Det Gronlandske Olieaktieselskab

Dixie Pipeline Company

Ethyleen Pijpleiding Maatschappij (Belgium) S.A.

Ethyleen Pijpleiding Maatschappij (Nederland) B.V.

Explorer Pipeline Company

General Atomic Company (Partnership)

Gulf Canada Limited

Gulf Oil Zaire S.A.R.L.

Harshaw — Murata Kabushika Kaisha

Harshaw — Juarez S.A. De C.V.

Harshaw Galvanotecnia

Harshaw Quimica Ltda.

Hochtemperatur Reaktorbau GMBH

Kuwait Oil Company Limited

Laurel Pipe Line Company

London Oil Refining Company Limited

Mid-Valley Pipeline Company

Midwest Carbide Corporation

Oil Shippers Service, Inc.

Oklahoma Nitrogen Company (Partnership)

Paloma Pipe Line Company

Pembroke Capital Company

Pembroke Cracking Company

Plastigama, S.A.

Platte Pipeline Company

Pol Transport AB

Polyquimicos, S.A.

Raffinerie De Cressier S.A.

Resinas Andinas S.A.

Rio Blanco Oil Shale Partnership

Sarni S.P.A. — Refining

Societe De Combustible Pour Reacteurs
A Haute Temperature (Corhat)

Solvent Refined Coal International, Inc.

Sunrise International Company Limited

Svensk Petroleum Administration A.B.

Svensk Petroleum Largring Tre A.B.

Svenska Petroleum Forvalting A.B.

Taita Chemical Corporation

Taiwan Plasticizer Corporation

Taiwan VCM Industries Corp.

Venezuela Gulf Refining Company

West Texas Gulf Pipe Line Company

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Nos. 81-1920, 81-1921, 81-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION, *et al.*,
Respondents.

NORTHERN NATURAL GAS COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION, *et al.*,
Respondents.

CITIES SERVICE GAS COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

MEMORANDUM OF RESPONDENT PHILLIPS PETROLEUM COMPANY IN SUPPORT OF PETITIONS FOR CERTIORARI

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Attorneys for Respondent Phillips Petroleum Company

May 1982

*Counsel of Record

QUESTIONS PRESENTED

Insofar as petitioners present the following questions, respondent Phillips Petroleum Company* joins in asking for review:

1. Whether Section 11 of the Helium Act, which in terms merely exempts helium from rate regulation under the Natural Gas Act, has an additional consequence: that of depriving of their defense of payment purchasers of natural gas streams containing helium under contracts conveying the entire stream, including the helium, when the producers of the natural gas claim an entitlement to special compensation for the helium in addition to the price paid under the purchase contracts.

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*In compliance with this Court's Rule 28.1, a list of corporations in which Phillips Petroleum Company holds less than a 100% interest follows: Acurex Corporation; Aero Oil Company; Alyeska Pipeline Service Company; Arctic LNG Transportation Company; Bonny LNG Limited; Bruin Carbon Dioxide Sales Corporation; Calatrava Empress Para la Industria, Petroquimica, S.A.; Canada Western Cordage Co., Ltd.; Canyon Reef Carriers Inc.; Chisholm Pipeline Company; Cochin Refineries Ltd.; Colonial Pipeline Company; Compagnie Francaise du Carbon Black S.A.; Dixie Pipeline Company; Drisco S.A. de C.V.; Everglades Pipeline Company; Explorer Pipeline Company; Insurance and Reinsurance Brokers, Ltd.; Iranian Marine International Oil Company; Kaw Pipe Line Company; Kensi LNG Corporation; LeeFac, Inc.; Negromex S.A.; Newmont Mining Corporation; Nordisk Philblack AB; Norland GmbH; Norpipe A/S; Norpipe Petroleum U.K. Ltd.; Norsea Gas A/S; Norsea Gas GmbH; Norsea Pipeline Ltd.; Papago Chemicals, Inc.; Petrochim; Phillips Carbon Black Limited; Phillips Carbon Black Company (Pty.) Ltd.; Phillips Carbon Black Italiana S.p.A.;

2. Whether any special compensation to such natural gas producers should be determined according to state law, as this Court ruled in *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974), or according to federal common law as the court below has ruled.

Phillips Gas Supply Corporation; Phillips Imperial Petroleum Limited; Phillips Pacific Chemical Company; Phillips Petroleum Singapore Chemicals (Private) Limited; Philmac Oils Limited; Plasticos Vanguardis S.A.; Polar LNG Shipping Corporation; Polyolefins; Quimica Veneco C.A.(b); Renolit Fertighaus GmbH; Salk Institute Biotechnology Industrial Assoc. Inc.; Seadock, Inc.; Seaway Pipeline Inc.; Sevalco (Holdings) Limited; SPODCO Ltd.; Venezoil, C.A.; Texas Offshore Port, Inc.; Transatlantic Reinsurance; Western Desert Operating Petroleum Company; White River Shale Oil Corporation.

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IN THE

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Nos. 81-1920, 81-1921, 81-1922

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On Petitions for Writs of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

MEMORANDUM OF RESPONDENT PHILLIPS PETROLEUM COMPANY IN SUPPORT OF PETITIONS FOR CERTIORARI

Phillips Petroleum Company is a respondent in these cases. Nominally it is aligned as a party in opposition to the petitioners because it is a producer of natural gas containing helium that it has sold to them. However, like three of the petitioners, National Helium Corporation, Northern Helex Company, and Cities Service Helex,

Phillips formerly processed helium-rich natural gas to extract the helium and sold the helium to the government under a long-term contract. Therefore, in separate proceedings it is the subject of claims by certain of its vendors, like the claims of the producers here, that the contracts by which those vendors parted with title to helium and were paid for it should be ignored and they should have a share of what Phillips earned under its government contract. Phillips joins in asking that certain of the questions presented by the petitioners, restated for convenience at the outset of this memorandum, should be heard by this Court.

STATEMENT

The decisions of the court of appeals in the helium title litigation, both in the case that is the subject of these petitions and cases in which producers have sued Phillips individually, represent a deep and unwarranted incursion into an area of state sovereignty.[1]

At issue are ordinary contracts for the sale of natural gas. Except to the limited extent that the Federal Energy Regulatory Commission regulates the producer price of natural gas and the terms of sale under the Natural Gas Act, such contracts are governed by state law. *Pan*

[1]All relevant decisions of the district courts and of the court of appeals are collected in the Joint Appendix to the petitions in these three cases and in No. 81-1919. The cases involving Phillips individually are Ashland Oil, Inc. v. Phillips Petroleum Co., 364 F. Supp. 6 (N.D. Okla. 1973) (Jt. App. A468-89), *aff'd in part, rev'd in part, and remanded*, 554 F.2d 381 (10th Cir.) (en banc) (Jt. App. A429-46), *cert. denied*, 434 U.S. 921, 968 (1977); *on remand*, 463 F. Supp. 619 (N.D. Okla. 1978) (Jt. App. A390-428), *aff'd in major part*, 607 F.2d 335 (10th Cir. 1979) (Jt. App. A385-89), *cert. denied*, 446 U.S. 936 (1980); Texaco Inc. v. Phillips Petroleum Co., 481 F.2d 70 (10th Cir. 1973) (Jt. App. A501-10), *rev'd*, 415 U.S. 125 (1974) (Jt. App. A494-A500).

American Petroleum Corp. v. Superior Court, 366 U.S. 656, 661-65 (1961); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). The meaning of a natural gas sales contract, in particular, is determined according to state law. In the first of its significant decisions in this group of cases, in 1971, the court of appeals recognized this proposition. The court ruled, first, on the basis of its analysis of the law of the relevant states that the typical oil and gas lease by which the right to extract oil or gas or both is conveyed by a land owner to a lessee comprehends any helium content of the natural gas. (Jt. App. A143-53.) It then ruled that the typical contract for the sale of natural gas by a lessee-producer to a pipeline or other purchaser comprehends the sale of all the constituent elements of the natural gas, including its helium content. (*Id.* at A157-58.) The court of appeals has not departed from these wholly correct rulings in the succeeding decade.

Nevertheless, the court of appeals has held throughout the same decade that effect is not to be given to the contracts insofar as they convey the lessee-producers' helium to purchasers in exchange for money. As the technical reason for this result, the court has relied upon Section 11 of the Helium Act, as added by the Helium Act Amendments of 1960, 50 U.S.C. § 167i. It has in addition taken a very expansive view of the consequences of the fact that since the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), sales of natural gas by producers for resale in interstate commerce are subject to the Natural Gas Act, and interstate natural gas sales contracts were designated by the Federal Power Commission to serve as rate schedules under Section 4 of the Natural Gas Act. Section 11 of the Helium Act provides that the Natural Gas Act does not apply to the sale of helium. The court of appeals has reasoned that, because natural gas sales con-

tracts are treated as rate schedules under the Natural Gas Act, which may not by Section 11 of the Helium Act Amendments cover helium, the sellers of helium-rich natural gas are free to ignore their contracts and to recover from their purchasers in quantum meruit for the helium content of the gas. (Jt. App. A158-68.)

The practical reason why Section 11 has been given such an extraordinary, far-reaching effect is the government's purchase of helium for storage pursuant to other provisions of the Helium Act Amendments of 1960. The government contracted with Phillips and the three other so-called helex companies (which are among the petitioners here) for the construction of pioneering helium extraction plants and the purchase by the government from them of a helium-nitrogen mixture to be carried by pipeline to a government storage facility for refining into pure helium as future needs might require. The price was separately negotiated with each of the companies and reflected the risks they ran in the development and use of new helium extraction technology. The court below thought that the lessee-producers of the helium should share in the helex companies' reward for taking that risk even though they took none of the risk themselves and even though they had knowingly contracted to sell and had been paid the contractual price for the helium content of their natural gas.

ARGUMENT

1. The question whether Section 11 of the Helium Act was meant by Congress to have the consequences that the court of appeals has attributed to it is an important question of federal law that has not been but should be decided by this Court.

The court of appeals has not seriously re-examined the question since it first gave its own answer in 1971. In the intervening period the court has filed three opinions on the merits of the helium litigation, two in a case involving Phillips and one of its vendors and the third its most recent opinion in this case. It has never engaged in a reasoned reconsideration of its 1971 decision that Section 11 opened the way for some natural gas producers to share in the rewards of enterprises to which they supplied the raw material and nothing more and even though they were paid for the raw material the price that they bargained for.[2]

The court's theory was flawed at the outset, and the flaws in it have been demonstrated many times over the years. The theory rests on a strained analogy to the case of, say, a railroad that offers warehousing services to shippers at no addition to its tariff rates. (Jt. App. A163.) Helium, according to the court below, is the unregulated commodity, comparable to the warehousing services, that cannot be included in a sale at a regulated rate. It has been pointed out over the years how much in the real world this line of reasoning ignores. It ignores the facts:

(1) that the natural gas producers and their purchasers entered into their contracts freely, many of them before

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[2]This litigation is sometimes known as *Grounds* and sometimes as the *Consolidated Helium Cases.* In its first Ashland-Phillips opinion in 1977, the court of appeals, which was sitting en banc and could perfectly well have reviewed the panel decision of 1971 in this case, said merely that "[t]he controlling rules were set in the *Grounds* opinion [of 1971], en banc consideration was denied, and the Supreme Court denied certiorari, 404 U.S. 951 . . . . We decline to reconsider *Grounds.*" (Jt. App. A437; *see also id.* at A445.) In the second Ashland-Phillips opinion, the underlying issue of the meaning of § 11 of the Helium Act was not even adverted to. Similarly in its most recent opinion in this case the court did not mention the underlying statutory issue.

the decision in *Phillips v. Wisconsin* and even more before Section 11 was enacted in 1960;

(2) that, if in those contracts no special value was assigned to the helium, that was a matter of free bargaining in the market as it then stood, not a forbidden concession by the producers, like free warehousing;

(3) that some of the contracts are explicit in permitting the seller to extract helium but waiving any claim to it if the extraction privilege is not exercised, and even under these contracts the court has released the seller from his bargain;[3]

(4) that many of the contracts are wholly unfrustrated, never having been affected in the slightest by Natural Gas Act rate regulation because the prices were at or below the reasonable maximum rates determined by the natural gas regulatory agency; and

(5) that, in any event, the Federal Power Commission (now the Federal Energy Regulatory Commission) did not take any steps in its regulation of natural gas calculated to prevent the parties from bargaining freely over the prices of the helium content of natural gas.

The court below has never taken account of how far its decision thus clashes with the facts. On the law, the court of appeals never considered the inconsistency of its straining to read Section 11 as affording to the natural gas producers a right of action they would not have had in the absence of the section with this Court's increasing skepticism over the past decade of claims that federal regulatory statutes should be construed as conferring by implication rights of actions on private individuals and companies. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

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[3] *See* Pet., No. 81-1920, p. 13.

The question posed by the court of appeals' construction of Section 11 clearly warrants this Court's review at this time.

2. Having abrogated the parties' contracts, the court of appeals has substituted an elaborate edifice of federal law to govern the rights of the sellers to compensation for helium. Its action is contrary to a decision of this Court, squarely in point and made in another of the helium title cases.

The case involved a claim of a natural gas producer, Texaco, against Phillips for compensation for helium. The complaint was filed in a federal court even though both parties were Delaware corporations. The district court dismissed for lack of diversity jurisdiction. The court of appeals held that the district court had jurisdiction because the court of appeals, in the original *Grounds* opinion, had created a federal cause of action for the reasonable value of helium and the case therefore arose under federal law. *Texaco Inc. v. Phillips Petroleum Co.*, 481 F.2d 70 (10th Cir. 1973) (Jt. App. A501-10).

This Court reversed summarily, on the certiorari papers and without bothering to hear argument. *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974). The Court held that, even if one assumed the correctness of the effect the court of appeals gave to Section 11 of the Helium Act and the Natural Gas Act (which was not at issue), the court had not created a federal cause of action but had merely opened the way for the assertion of a quantum meruit claim governed by state law. The Court said that "[t]he *Grounds* case cannot properly be read as creating a federal cause of action, deriving from the Natural Gas Act and § 11 of the Helium Conservation Act, for the recovery of the reasonable value of helium contained in natural gas sold at rates sanctioned by the

Federal Power Commission." 415 U.S. at 128. It said also that "Texaco's suit for the reasonable value of the helium is, in effect, an action in *quantum meruit,* whose source is state law and not federal law." *Id.* at 129.

Moreover, if the Court had thought that the case was to be determined according to federal common law, it would have decided the case differently because it had recently held in *Illinois v. City of Milwaukee,* 406 U.S. 91, 100 (1972), that "§ 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."

The court below has not been deterred by this Court's ruling in the *Texaco* case. In both this proceeding and the separate Ashland-Phillips litigation, the court of appeals has fashioned substantive rules for determining the value of helium contained in natural gas that have nothing to do with the laws of the states concerning recovery upon a contract or in quantum meruit. Indeed, as petitioners point out, especially the petitioners Panhandle Eastern and National Helium in No. 81-1920, the least consideration of the law of any of the states whose law might reasonably govern would have disclosed that, if there is a contract between the parties by which they have agreed on the value of the thing conveyed, there can be no recovery for some different "fair value" of the thing. (Pet., No. 81-1920, pp. 12-13.) Moreover, in determining the measure of a quantum meruit recovery, the court has insisted upon the use of a so-called work-back method of valuation without inquiry into whether such a method is consonant with the law of any of the states whose laws pertain to these proceedings.

In the decision of which review is now sought the court abandoned all pretense that it was doing anything other

than applying federal law where this Court had ruled that state law governs. The court of appeals declared that its decision in the Ashland-Phillips litigation in which it detailed how the work-back method was to be applied was the "law of the case" determinative of the rights of the many score parties to this separate litigation who were strangers to the Ashland-Phillips litigation. (Jt. App. A7, A13.) That is an extraordinary enough extension of the law of the case doctrine, which the petitioners properly question here as an instance in which, within the meaning of this Court's Rule 17.1(a), a court of appeals "has so far departed from the accepted and usual course of judicial proceeding . . . as to call for an exercise of this Court's power of supervision." Beyond that question, however, the invocation of Ashland-Phillips as the "law of the case" for *Grounds* demonstrates unmistakably that the court of appeals means, despite *Texaco,* to have federal law of its devising applied to the helium litigation.

The Ashland-Phillips transaction concerned helium contained in natural gas produced in Texas. This litigation concerns helium contained in natural gas produced in Kansas and Oklahoma as well as Texas. There could be no assurance that the governing law would be the same in the two cases if state law were properly applied. Yet the court of appeals has ruled that the valuation method it prescribed in the case involving solely two Texas contracts governs the valuation of helium in a case in which contracts from three states are involved. It can only mean that that method has its source in a body of law that is not the law of any state.

The departure from this Court's ruling in the *Texaco* case could not be plainer. Moreover, as petitioners show, there seems to be no justification on the basis of this Court's decisions for the application of federal common

law here, even assuming that *Texaco* left the question open. This Court should review the issue.

CONCLUSION

The petitions should be granted at least insofar as they present the questions stated at the outset of this memorandum.

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